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No. 05-1342

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IN THE

Supreme Court of the United States

LINDA A. WATTERS, Commissioner,
Michigan Office of Insurance and Financial Services,

Petitioner,

v.

WACHOVIA BANK, N.A., and WACHOVIA MORTGAGE CORPORATION,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS

Lori McAllister
William J. Perrone
DYKEMA GOSSETT PLLC
201 Townsend Street
Suite 900
Lansing, MI 48933
(517) 374-9150

Robert A. Long
Counsel of Record
Stuart C. Stock
Keith A. Noreika
Emily Johnson Henn
COVINGTON & BURLING LLP
1201 Pennsylvania Ave. NW
Washington, DC 20004-2401
(202) 662-6000

Counsel for Respondents

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

National banks' "incidental powers" under the National Bank Act include the power to conduct banking activities through operating subsidiaries that are licensed, regulated and supervised by the Office of the Comptroller of the Currency ("OCC"). National bank activities conducted through an operating subsidiary are subject to the "same terms and conditions" that apply to the conduct of such activities by the national bank. 12 U.S.C. § 24a; 12 C.F.R. § 5.34(e)(3). National banks' federally-authorized mortgage lending activities are regulated and supervised exclusively by the OCC. The questions presented are:

1. Whether national bank mortgage lending activities are subject to exclusive OCC regulation and supervision when conducted through an operating subsidiary, just as they are when conducted directly by the parent bank.

2. Whether the OCC's exclusive regulation and supervision of national bank mortgage lending activities conducted through operating subsidiaries is permissible under the Tenth Amendment.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties to the proceeding are listed in the caption. Wachovia Mortgage Corporation is a wholly-owned subsidiary of Wachovia Bank, N.A., which in turn is a wholly-owned subsidiary of Wachovia Corporation, a publicly-traded financial services holding company.

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BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 431 F.3d 556. The opinion of the district court (Pet. App. 14a-25a) is reported at 334 F. Supp. 2d 957.

JURISDICTION

The judgment of the court of appeals was entered on December 19, 2005. The court of appeals denied a petition for rehearing on January 18, 2006. Pet. App. 28a. The petition for a writ of certiorari was filed on April 18, 2006. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

Relevant portions of Article VI and Amendment X of the U.S. Constitution; Sections 24, 24a, 36, 43, 93a, 371, 481, 484, 1831v, and 1844 of Title 12, and Sections 6701, and 6714 of Title 15, United States Code; and Sections 5.34, 7.4000, 7.4006, 34.1, and 34.4 of Title 12, Code of Federal Regulations, are reprinted in the appendix to this brief. App., *infra*, 1a-34a. Relevant portions of Michigan's statutes are reprinted in the appendix to Petitioner's brief. Pet. Br. App. 1-34.

STATEMENT OF THE CASE

1. The National Bank Act and OCC Regulation of National Banks. The national banking system originated in 1791, when Congress chartered the first Bank of the United States. *See* Bray Hammond, *Banks & Politics in America* 114-18 (1957); Jonathan R. Macey et al., *Banking Law & Regulation* 3-4 (3d ed. 2001); Br. of the American Bankers' Ass'n, *et al.*, 8-12. The Bank provided a uniform national currency, a depository for public moneys, a source of credit for the

federal government, and a means by which the government could collect tax revenues. Hammond, *supra*, at 128-43. Congress chartered the second Bank of the United States in 1816. *Id.* at 209-26, 230-41. In *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819), the Court upheld Congress's power to charter the Bank and invalidated a State tax on the Bank under the Supremacy Clause. U.S. Const., art. VI, cl. 2.

From 1836 until 1863, the United States had no central banking system and no national currency. Macey, *supra*, at 9-10. During the Civil War, Secretary of the Treasury Salmon Chase proposed a national banking system through which the government could borrow money to pay for the war. Hammond, *supra*, at 723-25. Congress responded by enacting the National Currency Act of 1863 and the National Bank Act of 1864. *Id.* at 725-32.

The National Bank Act grants enumerated and "incidental" powers to national banks to engage in the business of banking. *See* 12 U.S.C. § 24. It has long been established that, "in the context of national bank legislation, . . . grants of both enumerated and incidental 'powers' to national banks" are "not normally limited by, but rather ordinarily pre-empt[ ], contrary state law." *Barnett Bank of Marion County, N.A.* v. *Nelson*, 517 U.S. 25, 32 (1996).

The National Bank Act also provides that "[n]o national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice or . . . exercised or directed by Congress." 12 U.S.C. § 484(a). "[V]isitorial powers" include examination of the bank's "manner of conducting business" and enforcement of applicable laws and regulations. *Guthrie* v. *Harkness*, 199 U.S. 148, 158 (1905). The limitation on visitorial powers in Section 484 was among the provisions enacted by Congress in 1864 to protect national banks against potentially hostile state actions. Congress was

aware of the earlier history of state hostility to the First and Second Banks of the United States, and it was foreseeable that new frictions would arise from the new national bank system.[1]

To address these concerns, the National Bank Act establishes national banks as "National favorites" and shields them "from the hazard of unfriendly legislation by the States." *Tiffany* v. *Nat'l Bank of Mo.*, 85 U.S. (18 Wall.) 409, 413 (1873). Under the National Bank Act, "the States can exercise no control over [national banks], nor in any wise affect their operation, except in so far as Congress may see proper to permit. Any thing beyond this is 'an abuse, because it is the usurpation of power which a single State cannot give.'" *Farmers' & Mechanics Nat'l Bank* v. *Dearing*, 91 U.S. 29, 34 (1875) (quoting *McCulloch*, 17 U.S. (4 Wheat.) 316, 430 (1819)).

"[T]he Comptroller bears primary responsibility for surveillance of 'the business of banking' authorized by § 24 Seventh." *NationsBank of N.C., N.A.* v. *Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256 (1995) (quoting 12 U.S.C. § 24 Seventh). Unless otherwise provided by federal law, the Office of the Comptroller of the Currency ("OCC") exercises exclusive licensing, regulatory, supervisory, examination, and enforcement authority with respect to national banks' compliance with both federal law and state laws that are applicable to national banks. *See* 12 U.S.C. §§ 24 Seventh, 484(a), 1818(b). Except to the extent "expressly and exclusively granted to another regulatory agency," the OCC is authorized to "prescribe rules and regulations to carry out the responsibilities of the office." 12 U.S.C. § 93a. *See also*

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[1] *See, e.g.*, Cong. Globe, 38th Cong., 1st Sess. 1893 (Apr. 27, 1864) (statement of Sen. Sumner) (comparing the potentially hostile use of state laws against national banks to the Maryland tax invalidated by the Court in *McCulloch*).

id. § 371(a) (authorizing OCC to "prescribe by regulation or order" restrictions on real estate lending by national banks).

2. National Bank Operating Subsidiaries. The National Bank Act grants national banks "all such incidental powers as shall be necessary to carry on the business of banking." 12 U.S.C. § 24 Seventh. By regulation first promulgated in 1966, the OCC has determined that the incidental powers of national banks include the power to conduct through "operating subsidiaries" activities that a national bank is authorized to conduct directly. 12 C.F.R. § 5.34. Under this regulation, national banks are licensed by the OCC to conduct specific activities through operating subsidiaries. *Id.* § 5.34(b).[2]

In 1999, Congress enacted the Gramm-Leach-Bliley Act, Pub. L. No. 106-102, 113 Stat. 1338 (1999) ("GLBA"), which endorsed the principle that banking activities conducted through an operating subsidiary are conducted subject to the "same terms and conditions that govern the conduct of such activities by national banks." 12 U.S.C. § 24a(g)(3)(A). As the Senate Report explained:

> "For at least 30 years, national banks have been authorized to invest in operating subsidiaries that are engaged only in activities that national banks may engage

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[2] Other financial institutions are also authorized to carry out their activities through operating subsidiaries. *See* 12 C.F.R. § 559.3(e) (federal savings associations may establish operating subsidiaries that "may engage in any activity that [the association] may conduct directly"); 12 C.F.R. §§ 223.3(w) (Federal Reserve Board treats operating subsidiaries of member banks as "part of the member bank"); 250.141(c) (Federal Reserve member banks may establish subsidiary corporations "engaged in activities that the bank itself may perform").

> in directly. For example, national banks are authorized directly to make mortgage loans and engage in related mortgage banking activities. Many banks choose to conduct these activities through subsidiary corporations . . . ." S. Rep. No. 106-44, at 8 (1999).

Other provisions of GLBA confirm that it is the nature of the activity conducted, and not the entity in which it is conducted, that determines the applicability of the OCC's exclusive supervisory regime. *See, e.g.*, 12 U.S.C. § 24a(a)(2)(A)(ii); *see infra* p. 20.

3. OCC Regulatory Framework. An interlocking framework of OCC regulations governs national bank mortgage lending activities through operating subsidiaries.

First, the OCC's operating subsidiary regulation parallels the language of GLBA, providing that "[a] national bank may conduct in an operating subsidiary activities that are permissible for a national bank to engage in directly," and such activities are conducted "pursuant to the same authorization, terms and conditions that apply to the conduct of such activities by its parent national bank." 12 C.F.R. § 5.34(e)(1), (3). The OCC comprehensively supervises and regulates the establishment and banking activities of operating subsidiaries by national banks, just as it regulates national banks themselves. *Id.* § 5.34(e).

Second, the OCC's real estate lending regulations implement 12 U.S.C. § 371(a), which grants national banks the power to engage in mortgage lending "subject to . . . such restrictions and requirements as the Comptroller of the Currency may prescribe by regulation or order." The OCC's real estate lending regulations provide that "a national bank may make real estate loans . . . without regard to state law limitations

concerning: . . . [l]icensing [and] registration," 12 C.F.R. § 34.4(a)(1). The real estate lending regulations "appl[y] to national banks and their operating subsidiaries." 12 C.F.R. § 34.1(b)

Third, 12 C.F.R. § 7.4006 provides: "Unless otherwise provided by Federal law or OCC regulation, State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank." Section 7.4006 rests on the principle, recognized in both GLBA and 12 C.F.R. § 5.34, that operating subsidiaries conduct activities subject to the "same terms and conditions" as apply to the bank. *See* 66 Fed. Reg. 34,784, 34,788 (July 2, 2001). The OCC determined that a "[f]undamental component" of this principle is that "state laws apply to operating subsidiaries to the same extent as they apply to the parent national bank." *Id.*[3]

Fourth, the OCC's visitorial powers regulation states that "[u]nless otherwise provided by federal law, the OCC has exclusive visitorial authority with respect to the content and conduct of activities authorized for national banks under federal law." 12 C.F.R. § 7.4000(a)(3). This regulation specifies that "[s]tate officials may not exercise visitorial powers with respect to national banks, such as conducting examinations, inspecting or requiring the production of books or records of national banks, or prosecuting enforcement actions, except in limited circumstances authorized by federal law." *Id.* § 7.4000(a)(1). The regulation defines "visitorial powers" to include "[e]xamination of a bank," "[i]nspection of a bank's books and records," "[r]egulation and

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[3] The Office of Thrift Supervision has promulgated a regulation providing that "state law applies to operating subsidiaries [of federal savings associations] only to the extent it applies to [federal savings associations]." 12 C.F.R. § 559.3(n)(1).

supervision of activities authorized or permitted pursuant to federal banking law," and "[e]nforcing compliance with any applicable federal or state laws concerning those activities." *Id.* § 7.4000(a)(2).

4. The Michigan Laws At Issue. Respondents challenged provisions of two Michigan statutes—the Mortgage Brokers, Lenders, and Services Licensing Act and the Secondary Mortgage Loan Act—that (i) require national bank operating subsidiaries to register and pay fees to the State before they may conduct banking activities in Michigan, and authorize the Commissioner to deny or revoke an operating subsidiary's registration (Mich. Comp. Laws §§ 445.1652(1), 445.1656(1)(d), 445.1657(1), 445.1658, 445.1679(1)(a), 493.52(1), 493.53a(d), 493.54, 493.55(4), 493.56a(2), and 493.61); (ii) require operating subsidiaries to submit annual financial statements to the Commissioner and retain certain documents in a particular format (*id.* §§ 445.1657(2), 445.1671, 493.56a(2)); (iii) grant the Commissioner examination and enforcement authority over registrants (*id.* §§ 445.1661, 493.56b); and (iv) authorize the Commissioner to take regulatory or enforcement actions against operating subsidiaries (*id.* §§ 445.1665, 445.1666, 493.58-59, and 493.62a). Michigan's laws exempt operating subsidiaries of national banks that have a branch in Michigan. *Id.* § 445.1652(1)(b), 445.1675(m), 493.53a(d).[4]

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[4] Prior versions of the Michigan laws did not apply to affiliates of a depository institution. *See* 1987 Mich. Pub. Act 173 § 25(m); 1981 Mich. Pub. Act 125. The laws were amended in 1996 and 1997 to exempt only affiliates of depository institutions that have a branch in Michigan. 1996 Mich. Pub. Act 210 § 25; 1997 Mich. Pub. Act 91 § 3a. At the time of the changes, the Michigan Financial Institutions Bureau explained that the changes were designed to increase the revenues that the Bureau could raise through licensing and registration fees (...continued)

Petitioner has general regulatory authority under the Secondary Mortgage Loan Act. *Id.* § 493.56b(1). Under the Mortgage Brokers, Lenders, and Services Licensing Act, the Commissioner has "back up" authority to act upon consumer complaints against national bank operating subsidiaries (in the event Petitioner deems the OCC's response inadequate), and general authority over operating subsidiaries in the absence of a complaint. *Id.* § 445.1663(2).

5. The Proceedings Below. Respondents brought this action seeking a determination that the challenged Michigan statutes, as applied to Wachovia Mortgage Corporation ("Wachovia Mortgage"), are preempted by the National Bank Act and the OCC's regulations. Wachovia Mortgage (previously named First Union Mortgage Corporation) registered under the Mortgage Brokers, Lenders and Servicers Licensing Act, Mich. Comp. Laws § 445.1656 *et seq.*, on March 27, 1997. On January 1, 2003, Wachovia Mortgage became an operating subsidiary of Wachovia Bank, N.A. ("Wachovia Bank"), and thereupon surrendered its Michigan registration in reliance upon federal law. Petitioner acknowledged the cancellation of Wachovia Mortgage's registrations but asserted that Wachovia Mortgage was no longer authorized to conduct mortgage lending activities in Michigan. J.A. 47a-48a.

The district court granted summary judgment in favor of Respondents, holding that the challenged Michigan laws are preempted as applied to national bank operating subsidiaries. Pet. App. 19a-23a. The court noted that "[t]he OCC holds broad and pervasive

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to allow the Bureau to be "self-funded" without having to rely on state legislature appropriations to fund the agency's budget. *See* Michigan Financial Institutions Bureau, *Mortgage Regulation Modernization (SB 871)* (Feb. 20, 1996).

authority to regulate national banking associations," and that "[i]n light of this statutory authority, it was within the OCC's authority to promulgate [12 C.F.R. §] 7.4006." Pet. App. 21a-22a. The court concluded that the Tenth Amendment "is not implicated" because Congress has authority under the Commerce Clause to regulate national banks and their operating subsidiaries. Pet. App. 24a.

The Sixth Circuit unanimously affirmed. Pet. App. 1a-13a. The court held that the OCC's regulations are within its authority and are a reasonable interpretation of the National Bank Act entitled to deference under *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Pet. App. 8a. The court concluded that "the Comptroller's regulations do not expand the definition of 'national bank' as Congress used it in [12 U.S.C. §] 484 to include an 'operating subsidiary,'" but rather, "the regulations interpret a national bank's 'incidental powers' under 12 U.S.C. § 24 (Seventh) to include the power to conduct business through an operating subsidiary." Pet. App. 8a.

The court held that "[t]he Comptroller has the authority to define a national bank's 'incidental powers' to include conducting the business of banking—in this case the making of first and second mortgage loans—through an operating subsidiary." Pet. App. 9a. "Having so defined a national bank's power to conduct business through an operating subsidiary," the court determined, "'the OCC further has the authority to preempt state law concerning operating subsidiaries to the same extent that those laws would be preempted with respect to the parent national bank.'" *Id.* at 9a (quoting *Wachovia Bank, N.A.* v. *Burke*, 414 F. 3d 305, 318 (2d Cir. 2005)).

The court concluded that "[t]he regulations, specifically section 7.4006, simply reflect the eminently reasonable conclusion that when a bank chooses to utilize the authority it is granted under federal law, it ought not

be hindered by conflicting state regulations." *Id.* at 11a. Each court of appeals that has considered the issue has reached the same result. *See Nat'l City Bank of Ind.* v. *Turnbaugh*, 463 F.3d 325 (4th Cir. 2006); *Wells Fargo Bank, N.A.* v. *Boutris*, 419 F.3d 949 (9th Cir. 2005); *Wachovia Bank, N.A.* v. *Burke*, 414 F.3d 305, 318-21 (2d Cir. 2005).[5]

SUMMARY OF THE ARGUMENT

1. a. The Michigan statues at issue in this case are preempted by the National Bank Act. The National Bank Act grants national banks both enumerated powers and all "incidental powers" needed to carry on the business of banking. 12 U.S.C. § 24 Seventh. The OCC has authority to determine the scope of national banks' incidental powers, and its reasonable determinations receive *Chevron* deference. *NationsBank of N.C., N.A.* v. *Variable Annuity Life Ins. Co.*, 513 U.S. 251, 258 & n.2. For 40 years, the OCC has recognized that a national bank's incidental powers include the power to conduct banking activities, such as mortgage lending, through an operating subsidiary that is licensed, supervised, and regulated by the OCC. 12 C.F.R. § 5.34. In 1999, Congress confirmed that national banks may conduct their banking activities through operating subsidiaries, "subject to the same terms and conditions that govern the conduct of such activities by national banks." 12 U.S.C. § 24a.

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[5] Every district court to have decided the issue has also reached this result. *See Nat'l City Bank of Ind.* v. *Turnbaugh*, 367 F. Supp. 2d 805 (D. Md. 2005); *Wachovia Bank, N.A.* v. *Burke*, 319 F. Supp. 2d 275 (D. Conn. 2004); *Wells Fargo Bank, N.A.* v. *Boutris*, 265 F. Supp. 2d 1162 (E.D. Cal. 2003); Pet. App. 14a-25a.

The Court has long "interpret[ed] grants of both enumerated and incidental 'powers' to national banks as . . . not normally limited by, but rather ordinarily pre-empting, contrary state law. *Barnett Bank of Marion County, N.A.* v. *Nelson*, 517 U.S. 25, 32 (1996). Accordingly, "where Congress has not expressly conditioned the grant of 'power' upon a grant of state permission, the Court has ordinarily found that no such condition applies." *Id.* at 34. *See also Franklin Nat'l Bank of Franklin Square* v. *New York*, 347 U.S. 373 (1954). Michigan's laws are preempted under Section 24 Seventh because they require national banks to obtain the State's permission to engage in mortgage lending through an operating subsidiary, and condition the exercise of that power on submission to State supervision, examination, and enforcement authority.

That conclusion is confirmed by Congress's recognition that national banks conduct their activities through operating subsidiaries subject to the "same terms and conditions" that apply to the national bank. 12 U.S.C. § 24a. The ordinary meaning of "terms and conditions" is "prerequisites," "restrictions," or "limitations." Michigan's laws seek to impose additional prerequisites, restrictions, and limitations on the exercise of national bank lending powers through operating subsidiaries and thus are preempted.

The "terms and conditions" that govern national bank activities include the requirement that such activities are subject to the OCC's exclusive "visitorial" authority, *i.e.*, that with limited exceptions specified by federal law, only the OCC examines, regulates, and supervises national banking activities. 12 U.S.C. § 484. Section 484 does not specifically mention operating subsidiaries, but that is not surprising given that national bank operating subsidiaries did not exist until a century after Section 484 was enacted. Furthermore, Congress recognized, in GLBA, that national banks conduct

activities through operating subsidiaries subject to the same terms and conditions that apply to national banks.

b. Michigan's laws are also preempted by several notice-and-comment rules promulgated by the OCC. The OCC's operating subsidiary rule, like GLBA, provides that national bank activities conducted through an operating subsidiary are subject to the "same authorization, terms, and conditions that apply to the conduct of those activities by the parent bank." 12 C.F.R. § 5.34(e)(3). A second OCC regulation, 12 C.F.R. § 7.4006, reflects the OCC's determination that the "same terms and conditions" language of 12 U.S.C. § 24a and 12 C.F.R. § 5.34 means that "state laws apply to national bank operating subsidiaries to the same extent that those laws apply to the national banks." And a third set of OCC regulations, governing real estate lending, provides that national bank operating subsidiaries are not subject to state licensing and registration requirements. 12 C.F.R. §§ 34.1(b), 34.4(a). These rules are within the OCC's delegated rulemaking authority, and thus have "no less pre-emptive effect than federal statutes." *Fidelity Fed. Sav. & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 153 (1982). "[A] pre-empting regulation's force does not depend on express congressional authorization to displace state law," *id.* at 154, but in this case Congress *has* granted such authorization to the OCC. *See* 12 U.S.C. § 43(a).

The OCC's reasonable interpretations of provisions of the National Bank Act (including the scope of national banks' incidental powers under Section 24 Seventh and the meaning of "same terms and conditions" in Section 24a) receive deference under the *Chevron* doctrine. *See, e.g., NationsBank*, 513 U.S. at 256-57. In a prior case involving the OCC, the Court distinguished "the question of the substantive . . . *meaning* of a statute" from "the question *whether* a statute is preemptive." *Smiley*, 517 U.S. at 744. Here, as in *Smiley*, Michigan's laws clearly

conflict with the substantive meaning of federal law as reasonably interpreted by the OCC, and thus the Court need not decide whether the OCC's answer to the second question receives *Chevron* deference. If it does, the Court should adhere to its recognition that agencies are "uniquely qualified" to determine whether a state law conflicts with a federal regulatory scheme, and therefore the agency's views on preemption are entitled to significant weight. *Geier* v. *Am. Honda Motor Co.*, 529 U.S. 861, 883 (2000); *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 496 (1996). Both questions identified in *Smiley* require policy determinations, and therefore the rationale of *Chevron*—that policy determinations should be made by a politically accountable branch of government—supports *Chevron* deference on both questions.

2. a. The OCC's regulations are consistent with principles of corporate law. The OCC regulates only national banking activities conducted through operating subsidiaries. It does not regulate corporate existence or corporate governance, which are determined by the law of the chartering State. Affiliated corporations often prepare consolidated financial statements, and corporate law allows subsidiaries to be treated as part of the parent corporation for regulatory purposes.

b. The OCC's exclusive supervision of mortgage lending conducted by national banks through operating subsidiaries also passes muster under the Tenth Amendment. Congress has the power to regulate commercial lending under the Commerce Clause, and "where a power is delegated to Congress in the Constitution the Tenth Amendment expressly disclaims any reservation of that power to the States." *New York* v. *United States*, 505 U.S. 144, 156 (1992). Moreover, the federal government is not seeking to "commandeer" state officials to carry out a federal program. To the contrary, the OCC has assumed sole responsibility for supervising national bank lending conducted through operating

subsidiaries. Finally, the OCC does not regulate corporate formation, dissolution or matters of corporate governance. It does regulate banking activities conducted through operating subsidiaries, but exclusive federal regulation of activities of state-chartered corporations is common and does not encroach on matters reserved to the States. Because there is clearly no Tenth Amendment violation in this case, and the OCC's supervision does not upset the usual balance of federal and state powers, there is no basis for applying a "clear statement" or "narrow construction" rule to the provisions of the National Bank Act.

ARGUMENT

I. National Bank Mortgage Lending Activities Are Supervised Exclusively By The OCC, Whether They Are Conducted Through An Operating Subsidiary Or Directly By The Bank.

Petitioner does not dispute the key principles necessary to resolve this case. A national bank such as Wachovia Bank is authorized by federal law to engage in mortgage lending activities. 12 U.S.C. § 371(a). Mortgage lending by a national bank is supervised and regulated exclusively by the OCC, not state banking regulators. *Id.*; *see also id.* § 484. And national banks' incidental powers include the power to conduct mortgage lending activities through an operating subsidiary as well as directly through the bank. 12 U.S.C. §§ 24 Seventh, 24a; Pet. Br. 21 ("[N]o one disputes that 12 U.S.C. § 24 (Seventh) authorizes national banks to use nonbank operating subsidiaries . . . .").

Petitioner nevertheless asserts that national bank mortgage lending activities, when conducted through an operating subsidiary rather than directly by the parent bank, become subject to state supervision and regulation. For two mutually-reinforcing reasons, Petitioner is incorrect. *First*, a national bank's incidental powers

under 12 U.S.C. § 24 Seventh include the power to conduct mortgage lending through an operating subsidiary. In addition, this Court has long recognized that States may not impose conditions on the exercise of national bank powers. Congress and the OCC have determined that when national banks conduct activities through an operating subsidiary, they do so subject to the "same terms and conditions" that apply to the conduct of those activities by the bank itself. *Second*, the OCC's regulations provide for exclusive OCC supervision and regulation of mortgage lending activities conducted through operating subsidiaries and preempt conflicting state laws. *See Fid. Fed. Sav. & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141 (1982). The OCC's determinations concerning the scope of national banks' incidental powers and the meaning of "same terms and conditions" are entitled to deference under the *Chevron* doctrine. Federal statutes and regulations, considered separately or in tandem, lead to the conclusion that a national bank's federally-authorized mortgage lending activities are regulated and supervised solely by the OCC, whether conducted directly by the bank or indirectly through an operating subsidiary. Thus, Petitioner's attempt to regulate here is barred.

A. Michigan's Laws Are Preempted Under The National Bank Act and GLBA.

1. A National Bank's Incidental Powers Under Section 24 Seventh Include The Power To Conduct Mortgage Lending Through An Operating Subsidiary.

The National Bank Act grants national banks both "enumerated powers" (such as the powers to accept deposits and make loans) and "all such incidental powers as shall be necessary to carry on the business of banking." 12 U.S.C. § 24 Seventh. "Incidental powers" include business activities that are "usual and useful" in the

business of banking. *Franklin Nat'l Bank of Franklin Square* v. *New York*, 347 U.S. 373, 377 (1954). *See also Arnold Tours, Inc.* v. *Camp*, 472 F.2d 427, 432 (1st Cir. 1972). The Comptroller is authorized to interpret the scope of § 24 Seventh and "has discretion to authorize activities beyond those specifically enumerated" in the National Bank Act. *NationsBank of N.C., N.A.* v. *Variable Annuity Life Ins. Co.*, 513 U.S. at 258 n.2. The OCC's reasonable exercise of that discretion is entitled to deference under the *Chevron* doctrine. *See id.* at 256-57; *Clarke* v. *Sec. Indus. Ass'n*, 479 U.S. 388, 403-04 (1987).

For 40 years, the Comptroller has recognized that the incidental powers of national banks include the power to carry out federally-authorized banking activities through an operating subsidiary. *See* 31 Fed. Reg. 11,459 (Aug. 31, 1966). The Comptroller's regulation authorizes national banks to conduct through operating subsidiaries only those activities that the national bank is authorized to conduct directly. 12 C.F.R. § 5.34(e). A national bank must submit an application or notification to the OCC whenever it establishes or purchases an operating subsidiary, or undertakes a new activity in an existing operating subsidiary. 12 C.F.R. § 5.34(b) & (e)(5). All activities of national bank operating subsidiaries are examined and supervised by the OCC, just as the OCC examines and supervises activities of national banks. 12 C.F.R. § 5.34(e). "An operating subsidiary conducts activities authorized under this section pursuant to the same authorization, terms and conditions that apply to the conduct of such activities by the parent national bank." *Id.* § 5.34(e)(3).

Operating subsidiaries are useful in the business of banking for a variety of reasons. They may assist in "controlling operations costs, improving effectiveness of supervision, [facilitating] more accurate determination of profits, decentralizing management decisions, or separating particular operations of the bank from other

operations." 31 Fed. Reg. 11,459, 11,460 (Aug. 31, 1966). In addition, "the use of a separate subsidiary structure can enhance the safety and soundness of conducting new activities by distinguishing the subsidiary's activities from those of the parent bank (as a legal matter) and allowing more focused management and monitoring of its operations." 61 Fed. Reg. 60,342, 60,354 (Nov. 27, 1996). *See also* Br. of Clearing House Ass'n.

Operating subsidiaries are a ubiquitous feature of the banking world. The OCC has licensed nearly 500 operating subsidiaries that deal directly with consumers,[6] and many others conduct activities that do not involve direct interactions with consumers. This Court's decision in *NationsBank* upheld the OCC's decision to authorize a national bank, via an operating subsidiary, to act as an agent in the sale of annuities. *See NationsBank*, 513 U.S. at 258-60. Similarly, in *Clarke* v. *Securities Industry Ass'n*, 479 U.S. 388 (1987), the Court upheld the OCC's determination that national banks may offer discount brokerage services through operating subsidiaries. In both cases, the Court's analysis was not altered by the fact that the national bank's powers were exercised through an operating subsidiary.

The power to conduct banking activities through operating subsidiaries is not confined to national banks. Federal savings and loan associations are also authorized to establish operating subsidiaries that "may engage in any activity that the [parent association] may conduct directly." *See* 12 C.F.R. § 559.3(e). Moreover, "[s]tate law applies to operating subsidiaries [of federal savings associations] only to the extent it applies to [the parent association]." 12 C.F.R. § 559.3(n)(1). In addition, the Federal Reserve Board treats operating subsidiaries of

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[6] www.occ.treas.gov/consumer/Report - 2006.xls.

member institutions (which include state-chartered banks) as "part of the member bank." 12 C.F.R. § 223.3(w); *see id.* § 250.141(c). All 50 States authorize state-chartered banks to engage in banking activities through operating subsidiaries.[7]

In sum, national banks are authorized to establish operating subsidiaries through which the bank may conduct its authorized activities pursuant to the "same terms and conditions" that apply to the national bank itself.

2. Congress Has Recognized That National Banks Conduct Banking Activities Through Operating Subsidiaries "Subject To The Same Terms And Conditions" That Apply To The National Bank.

In the Gramm-Leach-Bliley Act, Pub. L. No. 106-102, § 121, 113 Stat. 1338 (1999) ("GLBA"), Congress recognized that national banks conduct activities through operating subsidiaries subject to the same terms and conditions that apply to such activities when conducted by the bank. GLBA authorized national banks to own and operate a new type of subsidiary, "financial subsidiaries,"

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[7] *See* CSBS, *2004/2005 Profile of State-Chartered Banking* (20th ed.), at § III-42. Some States expressly provide that operating subsidiaries of state-chartered banks are treated as part of the parent bank for purposes of state laws regulating mortgage loans. *See, e.g.*, Ohio Admin. Code § 1301:1-3-10(E); Tenn. Code Ann. § 45-13-103(b); Tex. Fin. Code Ann. § 156.202(1)(A); Va. Code Ann. § 6.1-411(3). Other States have codified 12 C.F.R. § 7.4006, as a matter of state law. *See* Colo. Rev. Stat. Ann. § 5-3.5-303 ("Any provision of this article preempted by federal law with respect to a national bank or federal savings association shall also, to the same extent, not apply to an operating subsidiary of a national bank or federal savings association"); Ky. Rev. Stat. Ann. § 287.015 (same); Penn. Stat. § 456.504 (same).

that conducts activities that are "financial in nature." 12 U.S.C. § 24a(a)(2)(A)(i). Congress defined financial subsidiaries by distinguishing them from operating subsidiaries, which it described as national bank subsidiaries engaged "solely in activities that national banks are permitted to engage in directly *and are conducted subject to the same terms and conditions that govern the conduct of such activity by national banks.*" 12 U.S.C. § 24a(g)(3)(A) (emphasis added). Congress reiterated the "same terms and conditions" language in another provision of GLBA that authorizes financial subsidiaries, in addition to conducting "financial" activities, to conduct activities that the parent national bank could conduct directly "*subject to the same terms and conditions that govern the conduct of the activities by a national bank.*" 12 U.S.C. § 24a(2)(A)(ii) (emphasis added).[8] Congress thus provided that national banking activities are governed by the "same terms and conditions" whether those activities are conducted through an operating subsidiary, a financial subsidiary, or directly by the parent national bank.

Other provisions of GLBA demonstrate that when Congress wanted to allow State regulation of activities of national bank subsidiaries, it said so expressly. For example, GLBA provides that "[s]ecurities activities

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[8] In 1996, three years before GLBA was enacted, the OCC expanded the scope of 12 C.F.R. § 5.34 to authorize a special category of operating subsidiaries to engage in activities "different from [those] permissible for the parent national bank." 61 Fed. Reg. 60,342, 60,351 (Nov. 27, 1996). In GLBA, Congress authorized financial subsidiaries to undertake an even broader range of activities than "special" operating subsidiaries, but reinstated the OCC's longstanding principle that an operating subsidiary conducts only activities that can be conducted by the bank itself. The OCC amended 12 C.F.R. § 5.34 to implement GLBA. 65 Fed. Reg. 12,905 (Mar. 10, 2000).

conducted in a functionally regulated subsidiary of a depository institution shall be subject to regulation by the Securities and Exchange Commission, *and by relevant State authorities*, as appropriate . . . to the same extent as if they were conducted in a nondepository institution subsidiary of a bank holding company." 12 U.S.C. § 1844(c)(4)(A) (emphasis added). Similarly, "insurance agency and brokerage activities and activities as principal conducted in a functionally regulated subsidiary of a depository institution *shall be subject to regulation by a State insurance authority* to the same extent as if they were conducted in a nondepository institution subsidiary of a bank holding company." *Id.* § 1844(c)(4)(B) (emphasis added).[9] By specifying that banking activities are subject to the "same terms and conditions" whether conducted through operating subsidiaries, *id.* § 24a(g)(3)(A), financial subsidiaries, *id.* § 24a(a)(2)(A)(ii), or directly by national banks, Congress made clear that national banking activities such as mortgage lending are subject to uniform terms and conditions that do not change when the activity is conducted through a subsidiary.

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[9] Other federal statutes and regulations confirm that States have authority to regulate these specified activities. *See* 12 U.S.C. §§ 1820a, 1831v; 12 C.F.R. § 5.34(e)(3) & 5.39(k). Moreover, GLBA § 104(b), 15 U.S.C. § 6701(b), makes national banks' insurance activities subject to state licensing and regulation. *See also* GLBA, §§ 201 & 202 (amending the Securities and Exchange Act to provide that securities activities conducted directly by a national bank are subject to SEC regulation).

3. Grants Of Incidental Powers To National Banks Preempt State Laws That Condition The Exercise Of Those Powers.

The Court has long "interpret[ed] grants of both enumerated and incidental 'powers' to national banks as grants of authority not normally limited by, but rather ordinarily pre-empting, contrary state law." *Barnett Bank of Marion County, N.A.* v. *Nelson*, 517 U.S. 25, 32 (1996). Consequently, "where Congress has not expressly conditioned the grant of 'power' upon a grant of state permission, the Court has ordinarily found that no such condition applies." *Id.* at 34. Petitioner's assertion of authority to approve, regulate, and supervise national bank mortgage lending activities conducted through an operating subsidiary violates these longstanding principles.

For more than a century, this Court has held that States cannot impair or condition national banks' exercise of their federally authorized enumerated and incidental powers.[10] In *Franklin National Bank of Franklin Square* v. *New York*, 347 U.S. 373, 375-79 (1954), for example, this Court held that national banks have the "incidental power" to advertise and to use the word "savings" in their advertising. Justice Jackson's opinion for the Court looked to the National Bank Act, and held that incidental powers under Section 24 Seventh include use of business devices that are "usual and useful" in "[m]odern competition," and are to be broadly construed unless Congress provides "some affirmative indication to justify any interpretation" to the contrary. *Id.*

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[10] *See, e.g., Farmers' & Mechs. Nat'l Bank* v. *Dearing*, 91 U.S. 29, 33-35 (1875); *Easton* v. *Iowa*, 188 U.S. 220, 229 (1903); *First Nat'l Bank of San Jose* v. *Cal.*, 262 U.S. 366, 368-69 (1923).

Franklin held that national banks' incidental power to advertise preempted state laws that conditioned and impaired national banks' exercise of those federal powers. The Court found "no indication that Congress intended to make this phase of national banking subject to local restrictions, as it has done by express language in several other instances." *Id.* at 378.

This Court reaffirmed *Franklin* in *Barnett Bank*, which unanimously held that a federal statute that authorizes national banks to sell insurance in small towns preempted a state statute that forbids them to do so. In *Barnett Bank*, the Court noted that state laws that do *not* impair or condition a national bank's exercise of its powers are not preempted by federal law. *See* 517 U.S. at 33. *See also* 12 C.F.R. § 34.4(b). Accordingly, state laws governing subjects such as contracts, torts, trusts, and property, zoning, and criminal law generally are not preempted as applied to national banks' activities. But "where Congress has not expressly conditioned the grant of 'power' upon a grant of state permission, the Court has ordinarily found that no such condition applies." *Id.* at 34.[11]

Barnett Bank reaffirmed this Court's longstanding jurisprudence that emphatically rejects the idea that there is a general federal policy of "equality" between national banks and state-supervised institutions: "Congress did not intend to subject national banks' power

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[11] State laws that interfere with national bank powers are preempted regardless of whether they were intended to protect consumers. *See, e.g., Franklin*, 347 U.S. at 374, 377-79; *Easton* v. *Iowa*, 188 U.S. 220, 227-30. *See also* 12 U.S.C. § 43(a) (requiring OCC to follow notice and comment procedures in connection with opinion letters or interpretive rules that determine "Federal law preempts the application to a national bank of any State law regarding . . . *consumer protection*.") (emphasis added).

to local restrictions, [where] the federal power-granting statute . . . contain[s] 'no indication that Congress [so] intended . . . as it has done *by express language* in several other instances.'" *Barnett Bank*, 517 U.S. at 34 (quoting *Franklin*, 347 U.S. at 378 & n.7) (emphasis and second alteration in original). These "other instances"—national bank branching, interest rates, and trust operations, *see* 12 U.S.C. §§ 36, 85 & 92a—do not include national banks' power to engage in mortgage lending, whether directly or through an operating subsidiary.

Rather than adopting a policy of "equality," the National Bank Act makes national banks "National favorites." *See Tiffany* v. *Nat'l Bank of Mo.*, 85 U.S. (18 Wall.) 409, 413 (1874). In *Beneficial Nat'l Bank* v. *Anderson*, 539 U.S. 1, 9-11 (2003), the Court reiterated *Tiffany*'s statement that the National Bank Act reflects Congress's intent to protect national banks from "unfriendly State legislation." 539 U.S. at 10-11 (quoting *Tiffany*, 85 U.S. (18 Wall.) at 412).

Barnett Bank also rejects the contention (Pet. Br. 23-26) that a "presumption against preemption" applies in the context of national bank powers. *Barnett Bank* unanimously held that that "grants of both enumerated and incidental 'powers' to national banks" are "not normally limited by, but rather ordinarily pre-empt[], contrary state law." 517 U.S. at 32.

More generally, "an 'assumption' of nonpreemption is not triggered when the State regulates in an area where there has been a history of significant federal presence." *United States* v. *Locke*, 529 U.S. 89, 108 (2000) (quoting *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525 (1977)). Here, the history of "significant federal presence" reaches back to *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 436 (1819). Thus, Petitioner's reliance on a "presumption against preemption" is misplaced.

It is undisputed that a national bank's incidental powers include the power to conduct federally-authorized banking activities through an operating subsidiary. *See* Pet. Br. 21. The national bank exercises *its* federal powers through its operating subsidiary. Thus, the operative presumption in this case is that state laws that prevent, interfere with, or condition the exercise of national bank powers are preempted. *Barnett Bank*, 517 U.S. at 34; *Franklin*, 347 U.S. at 378-79.

Given national banks' "incidental power" pursuant to the National Bank Act to exercise their mortgage lending powers through operating subsidiaries, Michigan cannot, under *Franklin* and *Barnett Bank*, condition national banks' exercise of those powers on the grant of state permission.[12] Nor, under *Franklin* and *Barnett Bank* (and the many cases upon which they rely), can Michigan impede or impair a national bank's decision to exercise its mortgage lending powers through the "usual and useful" corporate structure of an operating subsidiary by subjecting national banks to fragmented state and local mortgage-lending regulation and supervision.

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[12] *See also First Nat'l Bank of E. Ark.* v. *Taylor*, 907 F.2d 775, 777-78 (8th Cir. 1990); *Bank of Am., Nat'l Trust & Sav. Ass'n* v. *Lima*, 103 F. Supp. 916, 917-18 (D. Mass. 1952).

4. Michigan's Laws Contravene The Principle That National Bank Powers Exercised Through Operating Subsidiaries Are Subject To The "Same Terms and Conditions" As Powers Exercised Directly By The National Bank.

In this case, well-established principles governing national bank powers and preemption are confirmed by specific statutory language. In 1999, Congress recognized that national banks' activities, when conducted through subsidiaries, are subject to the "same terms and conditions" as if they had been exercised directly by the bank itself. *See* 12 U.S.C. § 24a(a)(2)(A)(ii) & (g)(3)(A). The phrase "terms and conditions" ordinarily refers to prerequisites, restrictions, and limitations. *See* 3 Oxford English Dictionary 683, 684 (2d ed. 1989) ("condition" means "[s]omething demanded or required as a prerequisite to the granting or performance of something else"; "a restriction, qualification, or limitation"); *see also* 17 *id.* at 800 ("terms" means "[c]onditions or stipulations limiting what is proposed to be granted or done"; "a condition or prerequisite *of* something").

It is undisputed that when a national bank makes a mortgage loan directly (rather than through an operating subsidiary), its activities are supervised and regulated exclusively by the OCC, and are not subject to state permission or supervision. *See* 12 U.S.C. §§ 36(f), 93, 371(a), 484, 1818(b). Under Michigan law, however, when a national bank conducts mortgage lending through an operating subsidiary, its activities become subject to State registration, supervision, regulation and enforcement.[13] Requiring an operating subsidiary to

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[13] *See* Mich. Comp. Laws §§ 445.1652(1), .1656(1)(d), .1657, .1658, .1661, .1665-.1666, .1671, .1679(1)(a), 493.52(1), .53a(d), .54, .55(4), .56a-b, .58-.59, .61-62a.

obtain licenses from as many as 50 States (and any number of city and county governments) is not the same licensing "terms and conditions" as requiring a national bank to obtain a single license from the OCC. Similarly, requiring examination and supervision by 50 States and numerous local governments is not the same regulatory "terms and conditions" as requiring examination and supervision by a single federal agency. Petitioner's argument, if accepted, would permit States to apply their own substantive standards to national bank activities conducted through operating subsidiaries. *See, e.g., Nat'l City Bank of Ind.* v. *Turnbaugh*, 463 F.3d 325, 328-29 (4th Cir. 2006) (seeking to impose on operating subsidiaries a State restriction on mortgage prepayment fees that does not apply to national banks).

In short, Michigan's laws interfere with the exercise of national bank powers. Whether the interference is viewed as occurring at the parent or the subsidiary level, Michigan's laws are preempted.

5. The OCC's Exclusive Visitorial Authority Under Section 484 Is Among The "Terms And Conditions" Applicable To National Bank Activities Conducted Through Operating Subsidiaries.

Section 484 of Title 12 was enacted as part of the original National Bank Act in 1864 because of concern that States would target national banks with "unfriendly legislation" just as they had targeted the Bank of United States in *McCulloch*. *See supra* pp. 2-3 & n.1.[14] Section

[14] Section 484 is but one of the National Bank Act's provisions protecting against possible state interference. Congress also, for example, provided a federal formula constraining state limits on national bank interest rates and provided an exclusive federal remedy for usury claims against national banks. Act of 1864, ch. 106, § 30, 13 Stat. 99, 108 (1864); 12 U.S.C. §§ 85, 86. (...continued)

484 limits States' exercise of "visitorial powers" over national banks, providing that "[n]o national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice or . . . directed by Congress." 12 U.S.C. § 484(a).[15]

Visitation, as this Court recognized in *Guthrie* v. *Harkness*, concerns "examin[ation]" into the "manner of conducting business," *i.e.*, visitation is focused on national banks' activities. 199 U.S. 148, 157-59 (1905) ("Visitation" is "the act of a superior or superintending officer, who visits a corporation to examine into its manner of conducting business, and enforce an observance of its laws and regulations.") (internal quotation marks omitted). As the OCC's "visitorial powers" regulation confirms, visitorial powers include "[e]xamination of a bank," "[i]nspection of a bank's books and records," "[r]egulation and supervision of activities authorized or permitted pursuant to federal banking law," and "[e]nforcing compliance with any applicable federal or state laws *concerning those activities*." 12 C.F.R. § 7.4000(a)(2) & (3) (emphasis added). *See also* Pet. Br. 12 ("Visitorial powers include the examination and inspection of a national bank's books and records, as well as the enforcement of laws applicable to *a national bank's operations*") (emphasis added).

"Uniform rules limiting the liability of national banks and prescribing exclusive remedies for their overcharges are an integral part of a banking system that needed protection from 'possible unfriendly State legislation.'" *Beneficial Nat'l Bank* v. *Anderson*, 539 U.S. 1, 10-11 (2003) (citations omitted).

[15] Section 484(b) provides a limited exception "to ensure compliance with applicable State unclaimed property or escheat laws upon reasonable cause to believe that the bank has failed to comply with such laws." 12 U.S.C. § 484(b).

Section 484 contributes to the development and maintenance of a unitary national banking system by providing that the OCC is the exclusive supervisor of a national bank's federally-authorized banking activities except as provided by federal law. Importantly, pursuant to Section 484 the OCC enforces national banks' compliance with non-preempted *state* laws as well as federal laws. *See* 12 C.F.R. § 7.4000(a)(2); *see also* 12 U.S.C. § 36(f)(1)(A) & (B) ("The laws of the host State regarding community reinvestment, consumer protection, fair lending, and establishment of interstate branches" that are not preempted by federal law "shall be enforced, with respect to such branch, by the Comptroller of the Currency."); 12 U.S.C. § 1818(b)(1) (authorizing the OCC to enforce the provisions of any "law, rule, or regulation"); *Nat'l State Bank* v. *Long*, 630 F.2d 981, 987-88 (3d Cir. 1980). The same policy of uniform regulation and supervision of national bank activities, and the same concerns about possible state interference, arise whether the national bank is exercising its powers directly or though an operating subsidiary.

Petitioner argues, however, that Section 484's language (Pet. Br. 12-17) provides that operating subsidiaries of national banks are subject to state visitorial powers. Section 484 does no such thing. The provision restricts the exercise of visitorial powers by the States; it is not an affirmative grant of authority to the States. Section 484 is silent as to operating subsidiaries, but that silence is hardly surprising. Operating subsidiaries did not come in existence until 100 years after the enactment of Section 484. Thus, the 1864 Congress expressed no intent (let alone an "unambiguous" intent) to allow States to exercise visitorial authority over operating subsidiaries by failing to mention them in Section 484. Moreover, as discussed above, the exercise of visitorial power relates to the examination and supervision of national bank *activities*, whether carried out directly by the bank or through a subsidiary. *See* 12

C.F.R. § 7.4000(a)(3). Consequently, Section 484 does not support Petitioner's contention that States may regulate and supervise a national bank's activities when exercised through an operating subsidiary.

Petitioner also relies on 12 U.S.C. § 481, which authorizes the OCC to examine "affiliates" of national banks, 12 U.S.C. § 481, and notes that the definition of "affiliate" in 12 U.S.C. § 221a(b) includes operating subsidiaries. Pet. Br. 13, 14, 22. Petitioner argues that if Congress had intended to limit States' visitorial power over operating subsidiaries, it would have written Section 484 to apply not only to national banks but also to their "affiliates." *See id.* Petitioner's argument is unpersuasive for several reasons.

First, as noted above, neither the 1864 Congress that enacted Sections 481 and 484, nor the 1933 Congress that added the provisions regarding the examination of affiliates to Section 481 and the definition of "affiliate" in Section 221a, can be assumed to have had any intention as to the applicability of those laws to operating subsidiaries, which were not authorized until 1966. *See United Dominion Indus., Inc.* v. *United States*, 532 U.S. 822, 836 (2001) ("soundness" of the canon *expressio unius est exclusio alterius* "is a function of timing").

Second, the term "affiliate" covers many types of affiliates, including some that Congress *has* subjected to State visitorial powers. For example, the definition of "affiliate" in Section 221a(b) includes subsidiaries of a bank holding company that are authorized to engage in a wide range of financial activities, including non-banking activities that national banks (and their subsidiaries) are not authorized to conduct. *See* 12 U.S.C. § 1843(k). Such entities are subject to State regulation in connection with those activities.

Third, Sections 481 and 484 must be interpreted together with other provisions of federal banking law. *See*

U.S. Nat'l Bank of Or. v. *Indep. Ins. Agents of Am.*, 508 U.S. 439, 454 (1993) ("[i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy") (quoting *United States* v. *Heirs of Boisdore*, 49 U.S. (8 How.) 113, 122 (1849)). GLBA addressed the relationship among banks, affiliates and subsidiaries. Congress affirmatively provided that the *banking* activities of operating subsidiaries are subject to the same "terms and conditions" as the parent national bank, 12 U.S.C. § 24a, which include exclusive visitorial authority of the OCC, 12 U.S.C. § 484(a). At the same time, GLBA provided that States have authority to supervise *non-banking activities* such as securities and insurance activities. *See* 12 U.S.C. § 1844(c)(4); *see also, e.g.*, 12 U.S.C. §§ 1820a(c) & 1831v (applying the standards of Section 1844 to all federal banking agencies); 15 U.S.C. § 6701(b) (providing that "any person" who sells insurance must obtain a state license to do so). The relevant statutory provisions, considered as a whole, provide that States may not exercise visitorial authority over national bank operating subsidiaries through which national banks exercise their federal lending powers pursuant to a license granted by the OCC.

For the same reasons, the Court's decisions in *First National Bank in St. Louis* v. *Missouri*, 263 U.S. 640 (1924), and *Board of Governors of the Federal Reserve System* v. *Dimension Financial Corp.*, 474 U.S. 361, 371-73 (1986), do not support Petitioner. In *First National Bank in St. Louis*, the Court held that national banks' incidental powers did not include the power to establish branches, because such an incidental power conflicted with other provisions of federal law authorizing national banks to operate branches only in limited circumstances. Here, in contrast, the incidental power to conduct banking activities through operating subsidiaries does not conflict with Section 484 or other provisions of federal law, and

was recognized by Congress in GLBA, 12 U.S.C. § 24a(g)(3)(A).

Likewise, in *Dimension Financial*, the Federal Reserve Board adopted a definition of "bank" that conflicted with the plain statutory language. 474 U.S. at 367-68. In this case, in contrast, the OCC has not redefined the term "national bank" in Section 484. Instead, it has determined that a national's bank's incidental powers under Section 24 Seventh include the power to conduct federally-authorized banking activities through an operating subsidiary, subject to the same authorization, terms, and conditions as the bank, which includes visitation solely by the OCC. 12 C.F.R. § 5.34(e)(3). Congress recognized the same power in GLBA. *See* 12 U.S.C. § 24a(g)(3)(A).

Petitioner also attempts to draw support from the Alternative Mortgage Transaction Parity Act of 1982, Pub. L. No. 97-320, title VIII, § 803, 96 Stat. 1545 (the "Parity Act"), but that statute does not apply here. The Parity Act "eliminate[d] the discriminatory impact" on state chartered institutions that resulted from federal regulations "authorizing federally chartered depository institutions to engage in alternative mortgage financing." 12 U.S.C. § 3801(b).[16]

Preemption under the Parity Act is conditioned upon the requirement that state-chartered housing creditors maintain state licenses, *see* 12 U.S.C. § 3802.

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[16] The Senate report accompanying the Parity Act explained that for purposes of the Act, operating subsidiaries of state banks were to be treated the same as the parent bank. S. Rep. No. 97-463, at 55 (1982) ("Recognizing traditional industry lines," Congress noted that the Parity Act "authorizes [state] commercial banks, *including their subsidiaries*, to engage in transactions in accordance with regulations of the Comptroller of the Currency . . . .") (emphasis added).

But that condition does not apply to national banks and their operating subsidiaries, which look to the National Bank Act rather than the Parity Act for preemption of state laws regarding adjustable-rate mortgages. *See* 12 U.S.C. § 371; 12 C.F.R. §§ 34.1(b) & 34.21.[17] To the extent it is relevant to this case, the Parity Act demonstrates that Congress is not averse to preempting state banking laws, even as applied to state-chartered banks.

B. Michigan's Laws Are Also Preempted Under The OCC's Regulations.

1. Michigan's Laws Conflict With The OCC's Regulations.

Michigan's laws conflict not only with the provisions of the National Bank Act, but also with the OCC's regulations interpreting and implementing those provisions. *First*, Michigan's laws conflict with the OCC's operating subsidiary regulation, which provides that national banks conduct federally-authorized banking activities through an operating subsidiary pursuant to the "same authorization, terms and conditions that apply to the conduct of such activities by its parent national bank." 12 C.F.R. § 5.34(e)(3). As discussed above, pp. 18-20, the "same terms and conditions" language was adopted by the OCC after Congress used that language in GLBA to describe operating subsidiaries. As also discussed above,

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[17] The Office of Thrift Supervision also recognizes that subsidiaries of federal thrifts do not fall under the scope of the Parity Act, but rather enjoy preemption of state laws regarding ARM loans by virtue of the OTS regulations governing the operations of federal savings associations. *See* 67 Fed. Reg. 60,542, 60,550 (Sept. 26, 2002) ("Because operating subsidiaries of federal savings associations have the same lending authority and benefits of federal preemption, they do not need to use AMPTA to preempt state law.").

pp. 25-26, Michigan's laws conflict with this provision by subjecting a national bank's mortgage lending activities to state registration, supervision and enforcement when they are conducted through an operating subsidiary rather than directly by the national bank.

Second, Michigan's laws conflict with 12 C.F.R. § 7.4006, which provides that "State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank," 12 C.F.R. § 7.4006. The OCC has explained that Section 7.4006 follows directly from the principle, recognized in both GLBA and the OCC's operating subsidiary regulation, that national bank activities are governed by the "same terms and conditions," whether they are conducted directly or through an operating subsidiary. 66 Fed. Reg. 34,784, 34,788 (July 2, 2001). Section 7.4006 confirms that preemption of state law depends upon the nature of the national bank activity at issue, not the corporate entity through which the activity is carried out.

Third, Michigan's laws conflict with the OCC's real estate lending regulations. Congress has provided that national banks may engage in real estate lending "subject to . . . such restrictions and requirements as the Comptroller of the Currency may prescribe by regulation or order." 12 U.S.C. § 371(a). Section 371(a) subjects real estate lending by national banks to restrictions and requirements imposed by the OCC, not state law.[18] Pursuant to this grant of rulemaking authority, the OCC has determined that "state laws that obstruct, impair, or condition a national bank's ability to fully exercise its

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[18] Before it enacted the current version of Section 371(a), Congress imposed detailed requirements for real estate lending by national banks. *See* 12 U.S.C. § 371(a) (1976). At no point has Congress provided that States may impose additional or contrary requirements on real estate lending by national banks.

Federally authorized real estate lending powers do not apply to national banks." 12 C.F.R. 34.4(a). The regulations specify, in particular, that state "registration" requirements are preempted. 12 C.F.R. § 34.4(a)(1) ("[A] national bank may make real estate loans . . . without regard to state law limitations concerning . . . "[l]icensing" and "registration"). Michigan's mortgage-lending registration regime, under which Petitioner may deny or suspend registration, *see* Mich. Comp. Laws § 445.1665(1), imposes just such requirements on operating subsidiaries of national banks, in direct conflict with the OCC's regulations. The OCC has expressly provided that the regulations "appl[y] to national banks and their operating subsidiaries." 12 C.F.R. § 34.1(b). Accordingly, Michigan's laws also directly conflict with the OCC's real estate lending regulations.

Each of the OCC's rules is a "full-dress regulation, issued by the Comptroller himself and adopted pursuant to the notice-and-comment procedures of the Administrative Procedure Act designed to assure due deliberation." *Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. 735, 741 (1996). Under well-established principles, the OCC's regulations preempt Michigan's laws regulating mortgage lending by operating subsidiaries.[19]

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[19] Petitioner does not dispute that the OCC's operating subsidiary and real estate lending regulations are legislative rules. Section 7.4006, by its terms, is also a legislative rule. In evaluating the federalism implications of Section 7.4006 for purposes of Executive Order No. 13,132, the OCC stated that Section 7.4006 "itself does not effect preemption," but that statement reflected the OCC's determination that state law was already preempted under the operating subsidiary rule and GLBA. *See* 66 Fed. Reg. 34,784, 34,790 (July 2, 2001). The OCC noted that, in the event Section 7.4006 did broaden the preemptive scope of pre-existing regulations, the agency had complied with Executive Order No. 13,132. *Id.* at 34,790. (...continued)

2. The OCC's Regulations Have The Same Preemptive Effect As Federal Statutes.

It is well settled that "[f]ederal regulations have no less pre-emptive effect than federal statutes." *Fid. Fed. Sav. & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 153 (1982). Agency rules with the force of law are "Laws of the United States" for purposes of the Supremacy Clause, U.S. Const. art. VI, cl. 2. *See City of New York* v. *FCC*, 486 U.S. 57, 63 (1988) ("The phrase 'Laws of the United States' encompasses both federal statutes themselves and federal regulations that are properly adopted in accordance with statutory authorization.").

In *de la Cuesta*, the Court held that a regulation of the Federal Home Loan Bank Board permitting federal savings and loans associations to include due-on-sale clauses in mortgage contracts preempted a state law prohibiting such clauses. The Court stated that "[a] pre-emptive regulation's force does not depend on express congressional authorization to displace state law," and thus a "narrow focus on Congress' intent to supersede state law" is "misdirected." 458 U.S. at 154. "Rather," the Court held that the relevant questions are "whether the [agency] meant to pre-empt California's due-on-sale law, and, if so, whether that action is within the scope of the [agency's] delegated authority." *Id.* The Court has confirmed these principles of regulatory preemption many times. *See, e.g., U.S.* v. *Locke*, 529 U.S. 89, 109-10 (2000);

Moreover, the Comptroller has affirmed that Section 7.4006 has preemptive effect. *See* U.S. Br. in *Burke* v. *Wachovia Bank, N.A.*, No. 05-431, at 9 n.4. An agency's interpretation of its own regulation is "controlling" unless "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461-63 (1997) (internal quotation and citation omitted).

City of New York v. *FCC*, 486 U.S. 57 (1988); *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 700-05 (1984); *Blum* v. *Bacon*, 457 U.S. 132, 141-442 (1982).

Although express congressional authorization to displace state law is unnecessary under *de la Cuesta*, here Congress *has* recognized the OCC's authority to preempt state law. Congress has directed the OCC to follow notice and comment procedures "[b]efore issuing any opinion letter or interpretive rule . . . that concludes that Federal law preempts the application to any national bank of any State law regarding community reinvestment, consumer protection, fair lending or . . . intrastate branches." 12 U.S.C. § 43(a). This requirement necessarily assumes OCC authority to make preemption determinations.

Petitioner's *amici* incorrectly argue that, as part of the *de la Cuesta* analysis, "the court must inquire whether Congress has expressly provided for preemption." Center for State Enf. Br. 27. The Court rejected precisely that argument in *de la Cuesta* and subsequent cases. *See de la Cuesta*. 458 U.S. at 154 ("narrow focus on Congress' intent to supersede state law" is "misdirected"). *See also* Br. of Richard J. Pierce, *et al.*, 4-10. "[I]f the agency's choice to pre-empt 'represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.'" *City of New York*, 486 U.S. at 64 (quoting *United States* v. *Shimer*, 367 U.S. 374, 383 (1961)).

3. The OCC's Regulations Are Within The Scope Of Its Rulemaking Authority.

The OCC's regulations are within the scope of the Comptroller's delegated rulemaking authority under 12 U.S.C. §§ 93a and 371(a). Section 93a provides:

> "Except to the extent that authority to issue such rules and regulations has been expressly and exclusively granted to another regulatory agency, the Comptroller of the Currency is authorized to prescribe rules and regulations to carry out the responsibilities of the office, except that the authority conferred in this section does not apply to section 36 of this title or to securities activities of National Banks under the Act commonly known as the 'Glass-Steagall Act.'"

12 U.S.C. § 93a. This statutory language confers unusually broad rulemaking authority on the Comptroller. *First*, the Comptroller's rulemaking authority is not confined to a particular statute, but instead "is as broad as the OCC's statutory responsibilities." *Wells Fargo Bank, N.A.* v. *Boutris*, 419 F.3d 949, 958 (9th Cir. 2005) (citations omitted). *See also Conference of State Bank Supervisors* v. *Conover*, 710 F.2d 878, 883 (D.C. Cir. 1983) (per curiam). *Second*, the OCC's authority is limited only if rulemaking authority has been both "expressly" and "exclusively" conferred on another regulatory agency. 12 U.S.C. § 93a. *Third*, the two specific exceptions to the OCC's rulemaking authority (for national bank branching and securities activities) emphasize the breadth of the OCC's rulemaking authority in other areas. The statutory language itself thus contradicts the argument by some of Petitioner's amici that Section 93a is a very limited grant of rulemaking authority. *See* States' Br. 11-15; NAR Br. 19-20.[20]

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[20] The OCC has promulgated many critical banking regulations pursuant to its rulemaking authority under Section 93a. *See, e.g.*, 12 C.F.R. Part 3 (capital requirements); *id.* Part 6 (authority to order "prompt corrective action" by a potentially

(...continued)

Here, Section 93a's broad grant of rulemaking authority is reinforced by the specific grant of rulemaking authority in Section 371(a) for real estate lending. National banks engage in real estate lending "subject to . . . such restrictions and requirements as the Comptroller of the Currency may prescribe by regulation or order." 12 U.S.C. § 371(a). Prior to conferring this broad rulemaking authority on the Comptroller, Congress itself specified the restrictions on national banks' real estate lending. *See* p. 33 n. 18, *supra*. The 1982 amendments that adopted the current version of § 371(a) granted broad authority to the OCC, not the States, to determine applicable restrictions on the conduct of these activities. *See* Garn-St. Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, § 403(a), 96 Stat. 1469, 1510 (1982).

The Court's decision in *Gonzales* v. *Oregon*, 126 S. Ct. 904 (2006), does not support Petitioner. The Comptroller's rulemaking authority under Section 93a is much broader than the Attorney General's "narrowly defined delegation" under the Controlled Substances Act to promulgate rules "relating to the registration and control of the manufacture, distribution, and dispensing" of controlled substances. *Gonzales*, 126 S. Ct. at 917, 920. The grant of rulemaking authority in Section 93a is more like the broad grant of authority in the Federal Communications Act to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions" of the Act. *See Gonzales*, 126 S. Ct. at 916 (quoting 47 U.S.C. § 201(b)). In *Gonzales*, moreover, the Court found no statutory support for the

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failing institution); *id.* Part 16 (registration and disclosure requirements for securities); *id.* Part 23 (standards for personal property lease transactions); *id.* Part 37 (standards for debt cancellation and suspension contracts). The cramped interpretation of Section 93a offered by Petitioners' amici would call into question the validity of these regulations.

Attorney General's exercise of rulemaking authority to determine appropriate medical standards. 126 S. Ct. at 917-21. Here, in contrast, Congress has recognized that operating subsidiaries of national banks engage in federally-authorized banking activities subject to the "same terms and conditions" as the parent bank. 12 U.S.C. § 24a(g)(3)(A).

4. The OCC's Interpretation Of The National Bank Act Is Entitled To *Chevron* Deference.

The Court has held repeatedly that the OCC's interpretations of provisions of the National Bank Act are entitled to deference under *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council*, 467 U.S. 837 (1984). In *NationsBank* v. *Variable Annuity Life Ins. Co.*, the Court gave *Chevron* deference to the OCC's determination that a national bank's incidental powers under Section 24 Seventh include the power to act as an agent in the sale of annuities through an operating subsidiary. *See* 513 U.S. at 254, 256-57. The Court stated:

> "It is settled that courts should give great weight to any reasonable construction of a regulatory statute adopted by the agency charged with the enforcement of that statute. The Comptroller of the Currency is charged with the enforcement of banking laws to an extent that warrants the invocation of this principle with respect to his deliberative conclusions as to the meaning of these laws."

NationsBank, 513 U.S. at 256-57 (internal quotation marks and citations omitted). *See also Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. 735, 739-42 (1996) (according *Chevron* deference to Comptroller's interpretation of the National Bank Act); *Clarke* v. *Sec. Indus. Ass'n*, 479 U.S. 388, 403-09 (1987) (same). The

OCC's interpretations at issue in this case are embodied in notice-and-comment rules, but the Court has recognized, under "longstanding precedent," that the "rule of deference" applies to the Comptroller's "deliberative conclusions as to the meaning of [the banking] laws" even in the absence of notice-and-comment rulemaking. *United States* v. *Mead Corp.*, 533 U.S. 218, 231 & n.13 (2001).

Petitioner's contention (Pet. Br. 28-38) that the *Chevron* doctrine does not apply to this case is thus clearly incorrect.[21] The Comptroller's determination that national banks may conduct their federally-authorized banking activities through operating subsidiaries, subject to the same terms and conditions that apply when those activities are conducted by the bank itself, is an interpretation of the incidental powers of national banks under 12 U.S.C. § 24 Seventh, and it is plainly reasonable. *See* 12 U.S.C. § 24a(g)(3)(A) (operating subsidiaries conduct activities pursuant to the "same terms and conditions" as the parent bank). The Comptroller's determination is therefore entitled to *Chevron* deference under decisions such as *NationsBank*, *Smiley*, and *Clarke*.

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[21] In the courts below, Petitioner did not dispute that the *Chevron* doctrine applies to this case. In the district court, she acknowledged that *Chevron* applies and argued that the statutory language is ambiguous (*i.e.*, that this is a *Chevron* "Step Two" case). Defs.' Opp'n to Pls.' Mot. for Summ. J., at 8 (Feb. 20, 2004) (R.46). In the court of appeals, she argued that the statutory language is unambiguous, but continued to acknowledge that *Chevron* applies (*i.e.*, she argued that this is a *Chevron* "Step One" case). Pet. C.A. Br. at 17 (Apr. 12, 2005). In neither court did she argue that *Chevron* does not apply. Arguments not raised in either court below generally cannot be raised for the first time on appeal. *See Glover* v. *United States*, 531 U.S. 198, 205 (2001).

In *Smiley*, the Court distinguished between "the question of the substantive . . . *meaning* of a statute" and "the question of *whether* a statute is pre-emptive." 517 U.S. at 744. The Court answered the first question by deferring under *Chevron* to the OCC's interpretation of the term "interest" in 12 U.S.C. § 85. Because there was a clear conflict between state law and the National Bank Act (as reasonably interpreted by the OCC), the Court found it unnecessary to decide whether the Comptroller's answer to the second question (whether the statute is preemptive) also receives *Chevron* deference. *See Smiley*, 517 U.S. at 744.

The same analysis applies in this case. As we have shown, pages 15-32, *supra*, the OCC's interpretation of the incidental powers of national banks under Section 24 Seventh is reasonable. Moreover, Michigan's laws plainly conflict with the National Bank Act and the OCC's regulations by subjecting national banks' mortgage lending through an operating subsidiary to state examination, supervision, and regulation. *See* pp. 21-26, *supra*. Accordingly, the Court can decide this case, as it decided *Smiley*, without resolving the question whether agency preemption determinations are entitled to *Chevron* deference.[22]

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[22] One of Petitioner's amici acknowledges that *Chevron* applies to the OCC's interpretation of the National Bank Act, but argues that "if the agency asks the court to defer to its judgment that displacement [of state law] is required, all steps in the chain of logic that lead to this conclusion should be reviewed under the standard of *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944). Ctr. for State Enf. Br. 19-20. This contradicts the Court's decision in *Smiley*, which deferred to the Comptroller's interpretation of the National Banking Act notwithstanding the Comptroller's determination that federal law displaced state law. In many cases (including *Smiley* and this case), determining the substantive meaning of the federal statute effectively answers the question whether federal law is (...continued)

If the Court reaches that question, however, it should begin with its prior decisions holding that agency preemption determinations are entitled to substantial deference. The Court has recognized that federal agencies have special expertise in determining whether a state law conflicts with the purposes of a federal law administered by the agency, and therefore "the agency is uniquely qualified to determine whether a particular form of state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 496 (1996) (quoting *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941)). "The agency is likely to have a thorough understanding of its own regulation and its objectives and is 'uniquely qualified' to comprehend the likely impact of state requirements." *Geier* v. *Am. Honda Motor Co.*, 529 U.S. 861, 883 (2000). In such circumstances, "the agency's own views [on preemption] should make a difference" *Id.* (citation omitted). *See also id.* at 912 n.25 (Stevens, J., dissenting) (noting that Court defers to agency's interpretation of authority to issue preemptive regulations "as formally expressed through . . . explicitly pre-emptive regulations").[23]

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preemptive. Moreover, if agencies knew that they would be stripped of *Chevron* deference to their statutory interpretations by making a judgment that displacement of state law is required, they would have an incentive to avoid expressing such judgments, even though agencies are "uniquely qualified" to determine the likely impact of state laws on a federal regulatory scheme. *See Geier* v. *Am. Honda Motor Co.*, 529 U.S. at 883-84 (2000).

[23] In GLBA, Congress legislated against the background of what it termed "OCC Deference," *see* 15 U.S.C. § 6701(d)(2)(C)(i), regarding the OCC's preemption determinations concerning state insurance laws. Congress specified that courts shall not accord "unequal deference" to the OCC's preemption determinations concerning certain insurance activities if the (...continued)

Ultimately, a determination that a state law conflicts with federal law is, in large part, a policy determination. Under the rationale of *Chevron*, such determinations should be made by a politically-responsible branch of the government. *See Chevron*, 467 U.S. at 843-45. *See also* Br. of Richard J. Pierce, *et al.*, 14-19.

Petitioner and her amici assert that federal agencies do not give sufficient weight to federalism concerns, but it is by no means apparent that that this is so. States may participate in the notice-and-comment rulemaking process, as Michigan did in connection with some of the OCC rules at issue in this case.[24] In addition, agencies are hardly impervious to federalism concerns registered through elected officials. Congress holds agency oversight hearings and enacts legislation. Congress has actively monitored the OCC's preemption determinations, enacting both Section 43 (concerning the agency's procedures for issuing such determinations) and 15 U.S.C. §§ 6701(d)(2)(C)(i) & 6714(e) (concerning the degree of deference that courts should afford to such determinations when they relate to state insurance laws). Moreover, the Comptroller is appointed (and may be removed) by the President, and OCC rules are reviewed by the Office of Management and Budget within the

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state insurance law at issue was adopted on or after September 3, 1998, *id.* § 6714(e), but made this "unequal deference" provision inapplicable to state insurance laws adopted prior to that date, *id.* § 6701(d)(2)(C)(i). Congress thus contemplated that, except where expressly withheld by Section 6714(e), the OCC would receive deference in making preemption determinations regarding state insurance laws.

[24] *See, e.g.*, Letter from Linda A. Watters to John D. Hawke, Jr. (Oct. 3, 2003) (available at <www.michigan.gov/documents/Final_OFIS_Letter_10-3-031_75214_7.pdf>).

Executive Office of the President. *See* 12 U.S.C. § 2; Executive Order No. 13,132, 3 C.F.R. § 206 (2000).

II. Petitioner's Corporate Law And State Sovereignty Arguments Lack Merit.

A. The OCC's Exclusive Regulation Of National Banking Activities Conducted Through Operating Subsidiaries Is Consistent With Corporate Law Principles.

The OCC treats national bank operating subsidiaries as "incorporated departments or divisions of the bank" for regulatory purposes. 66 Fed. Reg. 34,784, 34,788 (July 2, 2001). National banks and their operating subsidiaries must submit consolidated financial statements to the OCC, and regulatory limits on lending and investment in bank premises are applied to the bank and its operating subsidiaries on a consolidated basis. *See* 12 C.F.R. § 5.34(e)(4). In addition, operating subsidiaries are treated as part of the parent bank for purposes of provisions governing national banks' transactions with their affiliates. *See* 12 U.S.C. § 371c(b)(2)(A).

Contrary to Petitioner's assertions (Pet. Br. 17-20), these federal regulatory requirements do not violate the principle of "corporate separateness." "Affiliated corporations, particularly a parent corporation and its subsidiaries, often prepare a consolidated financial statement or balance sheet, the purpose of which is to show their overall financial condition as a single organization or economic unit." 19 William M. Fletcher, *Fletcher Cyclopedia of the Law of Private Corporations* § 4.07 (6th ed. 2000). Moreover, treating an operating subsidiary as a part of the parent bank for federal regulatory purposes does not violate principles of corporate separateness. The OCC has stated that the formation, dissolution, and corporate governance of operating subsidiaries are governed by the law of the

chartering State, rather than federal law. "States do have jurisdiction over operating subsidiaries for matters concerning the corporate existence or corporate governance of operating subsidiaries." *Special Interest – On Preemption and Visitorial Powers*, 23-1 OCC QJ 21 (available at 2004 OCC QJ LEXIS 32 at *205). The OCC's regulations thus preserve the separate corporate identity of Wachovia Mortgage under the law of the chartering State (North Carolina, not Michigan).[25]

For this reason, Petitioner's reliance on *Dole Food Co.* v. *Patrickson*, 538 U.S. 468 (2003), and *United States* v. *Bestfoods*, 524 U.S. 51 (1998) is misplaced. In those cases, the Court interpreted federal statutory provisions in the light of basic corporate law principles. In this case, in contrast, the OCC's regulation of the banking activities of operating subsidiaries is entirely consistent with basic tenets of corporate law, including the principle of corporate separateness.

Rather than seeking to regulate every aspect of national bank operating subsidiaries, the OCC regulates only their federally authorized banking activities. Such federal regulation of activities of state-chartered corporations is common and does not violate corporate law principles. *See* 14 William M. Fletcher, *Fletcher Cyclopedia of the Law of Private Corporations* § 6672 (6th

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[25] Because Wachovia Mortgage is a North Carolina corporation, Michigan cannot claim to possess regulatory authority as the chartering jurisdiction. ~~Michigan's~~ laws, by their terms, do not apply to national bank operating subsidiaries when the parent national bank has a branch in Michigan. Mich. Comp. Laws §§ 445.1652(1)(b), 445.1675(m), 493.53a(d). This feature of Michigan's law contradicts Petitioner's argument (Pet. Br. 25 & n.87) that Michigan views the OCC's regulation of operating subsidiaries as inadequate. The OCC's regulation of national bank operating subsidiaries is exactly the same, whether or not the parent bank has a branch in Michigan.

ed. 2000) ("The power of the federal government to regulate and control corporations is derived primarily from the constitutional power vested in Congress to regulate commerce."). There are many examples of corporate activities that are exclusively regulated by federal agencies: When a state-chartered corporation broadcasts television or radio signals, operates a nuclear power plant, seeks patent protection for an invention, or engages in collective bargaining with its employees, its activities are regulated by a federal agency applying federal law.[26] Such regulation is entirely consistent with corporate law principles.

B. The OCC's Exclusive Regulation Of National Banks' Activities Conducted Through Operating Subsidiaries Is Permissible Under The Tenth Amendment.

There is also no merit to Petitioner's argument (Pet. Br. 39-44) that the Tenth Amendment prohibits the OCC's exclusive supervision of the banking activities of national bank operating subsidiaries. "If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States." *New York* v. *United States*, 505 U.S. 144, 156 (1992). Regulation of mortgage lending (and

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[26] *See, e.g.*, 47 U.S.C. §§ 303, 304 & 307 (FCC has exclusive authority to license radio and television broadcasting); *Pac. Gas & Elec. Co.* v. *State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 205 (1983) (federal government exclusively regulates "the radiological safety aspects involved in the construction and operation of a nuclear plant"); *Bonito Boats, Inc.* v. *Thunder Craft Boats, Inc.*, 489 U.S. 141, 152-53 (1989) (corporation receives patent protection exclusively from federal law); *San Diego Bldg. Trades Council, Millmen's Union, Local 2020* v. *Garmon*, 359 U.S. 236, 241-45 (1959) (NLRB jurisdiction to determine permissible conduct under the National Labor Relations Act).

other banking activities) falls squarely within Congress's power "[t]o regulate Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3. As this Court has held, "[n]o elaborate explanation is needed to make evident the broad impact of commercial lending on the national economy or Congress' power to regulate that activity pursuant to the Commerce Clause." *Citizens Bank* v. *Alafabco, Inc.*, 539 U.S. 52, 58 (2003) (per curiam).

This is not a case in which the federal government seeks to "commandeer" state officials to carry out a federal program. To the contrary, the OCC has undertaken the task of regulating the federally-authorized banking activities conducted by national banks through their operating subsidiaries. Accordingly, the "anti-commandeering" principle recognized in cases such as *New York* and *Printz* v. *United States*, 521 U.S. 898 (1997), has no application here.

Petitioner nevertheless argues that the OCC's regulations violate the Tenth Amendment by "federalizing" state-chartered corporations. Pet. Br. 39-44. As already noted, Wachovia Mortgage is a North Carolina corporation, not a Michigan corporation. Consequently, Petitioner cannot argue that the OCC's regulation of Wachovia Mortgage's lending activities infringes Michigan's chartering authority. Furthermore, Petitioner's assertion that the OCC has "federalized" a state corporation is simply incorrect. The OCC's regulations do not "convert" state-chartered corporations into federally-chartered corporations. As noted above, *see* p. 45, the OCC expressly disclaims authority to regulate the formation, dissolution, and corporate governance of operating subsidiaries.[27] The OCC's guidance makes

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[27] Contrary to Petitioner's contention (Pet. Br. 7), Respondents have not challenged Michigan's requirement that foreign (...continued)

clear that only federally-authorized *banking activities* that national banks conduct through their operating subsidiaries are regulated by the OCC. *Id.*

This case is thus quite different from *Hopkins Federal Savings & Loan Association* v. *Cleary*, 296 U.S. 315 (1935), and *Chicago Title & Trust Co.* v. *Forty-One Thirty-Six Wilcox Bldg. Corp.*, 302 U.S. 120 (1937). In *Hopkins*, the "critical question" was whether Congress had the power "to put an end to corporations created by the states and turn them into different corporations created by the nation." *Id.* at 336. Rather than merely regulating activities of the state-chartered association, the federal statute at issue in *Hopkins* provided for state associations to be *dissolved*, so that "creatures of the state become creatures of the Nation." *Id.* at 337. The Court held that Congress had impermissibly encroached "upon a domain of activity set apart by the Constitution as the province of the states." *Id.* at 338-39. Here, there is no such encroachment because the OCC does not purport to regulate corporate dissolution.

The issue in *Chicago Title & Trust Co.* was the mirror-image of the issue in *Hopkins*: whether Section 77B of the Bankruptcy Act could be interpreted to have the effect of "breath[ing] life into a corporate entity . . . put to death by the state in the lawful exercise of its sovereign authority." 302 U.S. at 128. The Court's decision rested on the principle that "[h]ow long and upon what terms a state-created corporation may continue to

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corporations obtain a corporate certificate of authority from the Michigan Corporation Division. *See* Mich. Comp. Laws § 450.2011. Such laws may be an aspect of corporate infrastructure that is regulated by the States rather than the OCC. *See* 12 C.F.R. § 34.4(a)(1) (state laws providing for registration for purposes of service of process apply to both national banks and their operating subsidiaries).

exist is a matter exclusively of state power." *Id.* That principle is not implicated here, because the OCC does not regulate the existence or corporate governance of operating subsidiaries.

In sum, the OCC's exclusive supervision and regulation of national banking activities conducted through operating subsidiaries is consistent with *Hopkins* and *Chicago Title*. As noted above (pp. 45-46 & n. 26), exclusive federal regulation of activities of state-chartered corporations is well established. Such regulation is entirely consonant with the design of our federal system, which, through the Supremacy Clause, "gives the Federal Government 'a decided advantage in th[e] delicate balance' the Constitution strikes between state and federal power." *New York*, 505 U.S. at 159 (quoting *Gregory* v. *Ashcroft*, 501 U.S. 452, 460 (1991)). Accordingly, there is no Tenth Amendment violation in this case.[28]

For the same reasons, there is no basis for applying the doctrine of "constitutional doubt" or the "clear statement rule" of *Gregory* v. *Ashcroft*, 501 U.S. 452 (1991), in this case. The "constitutional doubt" doctrine applies only to *serious* constitutional questions. *Reno v. Flores*, 507 U.S. 292, 314 n.9 (2002). Here, there is no question, let alone a "serious" question, that federal

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[28] The Court has upheld federal banking laws that have a far more intrusive effect on the States than the laws at issue in this case. *See, e.g., Missouri ex rel. Burnes Nat'l Bank of St. Joseph* v. *Duncan*, 265 U.S. 17, 23 (1924) (invalidating state limitations on national banks' fiduciary activities in state courts, despite recognition that there is "nothing over which a State has more exclusive authority than the jurisdiction of its courts"); *Van Reed* v. *People's Nat'l Bank of Lebanon*, 198 U.S. 554, 557 (1905) (upholding federal law prohibiting pre-judgment attachment against national banks in state court actions).

regulation of mortgage lending activities is permissible under the Tenth Amendment. Therefore the "constitutional doubt" rule has no application here. Similarly, exclusive federal regulation of corporate activities is well established and does not "upset the usual constitutional balance of federal and state powers." *Gregory* v. *Ashcroft*, 501 U.S. at 460. Consequently, the "clear statement" rule of *Gregory* v. *Ashcroft* does not apply.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted,

Lori McAllister
William J. Perrone
DYKEMA GOSSETT PLLC
201 Townsend Street
Suite 900
Lansing, MI 48933
(517) 374-9150

Robert A. Long
Counsel of Record
Stuart C. Stock
Keith A. Noreika
Emily Johnson Henn
COVINGTON & BURLING LLP
1201 Pennsylvania Ave., NW
Washington, DC 20004-2401
(202) 662-6000

Counsel for Respondents

NOVEMBER 3, 2006

APPENDIX

APPENDIX

CONSTITIONAL PROVISIONS INVOLVED

Article VI, clause 2.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Amendment X.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

FEDERAL STATUTES INVOLVED

Provisions of the National Bank Act (12 U.S.C.)

§ 24. Corporate powers of associations

Upon duly making and filing articles of association and an organization certificate a national banking association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power –

* * *

Seventh. To exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of title 62 of the Revised Statutes.

* * *

§ 24a. Financial subsidiaries of national banks

(a) Authorization to conduct in subsidiaries certain activities that are financial in nature

(1) In general

Subject to paragraph (2), a national bank may control a financial subsidiary, or hold an interest in a financial subsidiary.

(2) Conditions and requirements

A national bank may control a financial subsidiary, or hold an interest in a financial subsidiary, only if –

(A) the financial subsidiary engages only in –

(i) activities that are financial in nature or incidental to a financial activity pursuant to subsection (b) of this section; and

(ii) activities that are permitted for national banks to engage in directly (subject to the same terms and

conditions that govern the conduct of the activities by a national bank);

* * *

(5) Regulations required

Before the end of the 270-day period beginning on November 12, 1999, the Comptroller of the Currency shall, by regulation, prescribe procedures to implement this section.

* * *

(g) Definitions

For purposes of this section, the following definitions shall apply:

(1) Affiliate, company, control, and subsidiary

The terms "affiliate", "company", "control", and "subsidiary" have the meanings given those terms in section 1841 of this title.

(2) Appropriate Federal banking agency, depository institution, insured bank, and insured depository institution

The terms "appropriate Federal banking agency", "depository institution", "insured bank", and "insured depository institution" have the meanings given those terms in section 1813 of this title.

(3) Financial subsidiary

The term "financial subsidiary" means any company

that is controlled by 1 or more insured depository institutions other than a subsidiary that –

(A) engages solely in activities that national banks are permitted to engage in directly and are conducted subject to the same terms and conditions that govern the conduct of such activities by national banks; or

(B) a national bank is specifically authorized by the express terms of a Federal statute (other than this section), and not by implication or interpretation, to control, such as by section 25 or 25A of the Federal Reserve Act [12 U.S.C.A. §§ 601 et seq., 611 et seq.] or the Bank Service Company Act [12 U.S.C.A. § 1861 et seq.].

* * *

§ 36. Branch banks

The conditions upon which a national banking association may retain or establish and operate a branch or branches are the following:

* * *

(f) Law applicable to interstate branching operations

(1) Law applicable to national bank branches

(A) In general

The laws of the host State regarding community reinvestment, consumer protection, fair lending, and establishment of intrastate branches shall apply to any branch in the host State of an out-of-State national bank to the same extent as such State laws

apply to a branch of a bank chartered by that State, except –

(i) when Federal law preempts the application of such State laws to a national bank; or

(ii) when the Comptroller of the Currency determines that the application of such State laws would have a discriminatory effect on the branch in comparison with the effect the application of such State laws would have with respect to branches of a bank chartered by the host State.

(B) Enforcement of applicable State laws

The provisions of any State law to which a branch of a national bank is subject under this paragraph shall be enforced, with respect to such branch, by the Comptroller of the Currency.

* * *

§ 43. Interpretations concerning preemption of certain State laws

(a) Notice and opportunity for comment required

Before issuing any opinion letter or interpretive rule, in response to a request or upon the agency's own motion, that concludes that Federal law preempts the application to a national bank of any State law regarding community reinvestment, consumer protection, fair lending, or the establishment of intrastate branches, or before making a determination under section 36(f)(1)(A)(ii) of this title, the appropriate Federal banking agency (as defined in section 1813 of this title) shall –

(1) publish in the Federal Register notice of the preemption or discrimination issue that the agency is considering (including a description of each State law at issue);

(2) give interested parties not less than 30 days in which to submit written comments; and

(3) in developing the final opinion letter or interpretive rule issued by the agency, or making any determination under section 36(f)(1)(A)(ii) of this title, consider any comments received.

(b) Publication required

The appropriate Federal banking agency shall publish in the Federal Register –

(1) any final opinion letter or interpretive rule concluding that Federal law preempts the application of any State law regarding community reinvestment, consumer protection, fair lending, or establishment of intrastate branches to a national bank; and

(2) any determination under section 36(f)(1)(A)(ii) of this title.

(c) Exceptions

(1) No new issue or significant basis

This section shall not apply with respect to any opinion letter or interpretive rule that –

(A) raises issues of Federal preemption of State law that are essentially identical to those previously resolved by the courts or on which the agency has

previously issued an opinion letter or interpretive rule; or

(B) responds to a request that contains no significant legal basis on which to make a preemption determination.

(2) Judicial, legislative, or intragovernmental materials

This section shall not apply with respect to materials prepared for use in judicial proceedings or submission to Congress or a Member of Congress, or for intragovernmental use.

(3) Emergency

The appropriate Federal banking agency may make exceptions to subsection (a) of this section if –

(A) the agency determines in writing that the exception is necessary to avoid a serious and imminent threat to the safety and soundness of any national bank; or

(B) the opinion letter or interpretive rule is issued in connection with –

(i) an acquisition of 1 or more banks in default or in danger of default (as such terms are defined in section 1813 of this title); or

(ii) an acquisition with respect to which the Federal Deposit Insurance Corporation provides assistance under section 1823(c) of this title.

§ 93a. Authority to prescribe rules and regulations

Except to the extent that authority to issue such rules and regulations has been expressly and exclusively granted to another regulatory agency, the Comptroller of the Currency is authorized to prescribe rules and regulations to carry out the responsibilities of the office, except that the authority conferred by this section does not apply to section 36 of this title or to securities activities of National Banks under the Act commonly known as the "Glass-Steagall Act".

§ 371. Real estate loans

(a) Authorization to make real estate loans: orders, rules, and regulations of Comptroller of the Currency

Any national banking association may make, arrange, purchase or sell loans or extensions of credit secured by liens on interests in real estate, subject to section 1828*(o)* of this title and such restrictions and requirements as the Comptroller of the Currency may prescribe by regulation or order.

* * *

§ 481. Appointment of examiners; examination of member banks, State banks, and trust companies; reports

The Comptroller of the Currency, with the approval of the Secretary of the Treasury, shall appoint examiners who shall examine every national bank as often as the Comptroller of the Currency shall deem necessary. The examiner making the examination of any national bank shall have power to make a thorough examination of all the affairs of the bank and in doing so he shall have

power to administer oaths and to examine any of the officers and agents thereof under oath and shall make a full and detailed report of the condition of said bank to the Comptroller of the Currency: *Provided,* That in making the examination of any national bank the examiners shall include such an examination of the affairs of all its affiliates other than member banks as shall be necessary to disclose fully the relations between such bank and such affiliates and the effect of such relations upon the affairs of such bank; and in the event of the refusal to give any information required in the course of the examination of any such affiliate, or in the event of the refusal to permit such examination, all the rights, privileges, and franchises of the bank shall be subject to forfeiture in accordance with sections 141, 222 to 225, 281 to 283, 285, 286, 501a and 502 of this title.

* * *

§ 484. Limitation on visitorial powers

(a) No national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice or such as shall be, or have been exercised or directed by Congress or by either House thereof or by any committee of Congress or of either House duly authorized.

(b) Notwithstanding subsection (a) of this section, lawfully authorized State auditors and examiners may, at reasonable times and upon reasonable notice to a bank, review its records solely to ensure compliance with applicable State unclaimed property or escheat laws upon reasonable cause to believe that the bank has failed to comply with such laws.

Provision of the Federal Deposit Insurance Act (12 U.S.C.)

§ 1831v. Authority of State insurance regulator and securities and exchange Commission

(a) In general –

Notwithstanding any other provision of law, the provisions of –

(1) section 1844(c) of this title that limit the authority of the Board of Governors of the Federal Reserve System to require reports from, to make examinations of, or to impose capital requirements on holding companies and their functionally regulated subsidiaries or that require deference to other regulators;

(2) section 1844(g) of this title that limit the authority of the Board to require a functionally regulated subsidiary of a holding company to provide capital or other funds or assets to a depository institution subsidiary of the holding company and to take certain actions including requiring divestiture of the depository institution; and

(3) section 1848a of this title that limit whatever authority the Board might otherwise have to take direct or indirect action with respect to holding companies and their functionally regulated subsidiaries;

shall also limit whatever authority that a Federal banking agency might otherwise have under any statute or regulation to require reports, make examinations, impose capital requirements, or take any other direct or indirect action with respect to any functionally regulated affiliate of a depository institution, subject to the same standards and requirements as are applicable to the

Board under those provisions.

* * *

(c) Definitions

For purposes of this section, the following definitions shall apply:

(1) Functionally regulated subsidiary

The term "functionally regulated subsidiary" has the meaning given the term in section 1844(c)(5) of this title.

(2) Functionally regulated affiliate

The term "functionally regulated affiliate" means, with respect to any depository institution, any affiliate of such depository institution that is –

(A) not a depository institution holding company; and

(B) a company described in any clause of section 1844(c)(5)(B) of this title.

Provision of the Bank Holding Company Act (12 U.S.C.)

§ 1844. Administration

* * *

(c) Reports and examinations

* * *

(4) Functional regulation of securities and insurance activities

(A) Securities activities

Securities activities conducted in a functionally regulated subsidiary of a depository institution shall be subject to regulation by the Securities and Exchange Commission, and by relevant State securities authorities, as appropriate, subject to section 6701 of Title 15, to the same extent as if they were conducted in a nondepository institution subsidiary of a bank holding company.

(B) Insurance activities

Subject to section 6701 of Title 15, insurance agency and brokerage activities and activities as principal conducted in a functionally regulated subsidiary of a depository institution shall be subject to regulation by a State insurance authority to the same extent as if they were conducted in a nondepository institution subsidiary of a bank holding company.

(5) Definition

For purposes of this subsection, the term "functionally regulated subsidiary" means any company –

(A) that is not a bank holding company or a depository institution; and

(B) that is –

(i) a broker or dealer that is registered under the Securities Exchange Act of 1934 [15 U.S.C.A. § 78a et seq.];

(ii) a registered investment adviser, properly registered by or on behalf of either the Securities and Exchange Commission or any State, with respect to the investment advisory activities of such investment adviser and activities incidental to such investment advisory activities;

(iii) an investment company that is registered under the Investment Company Act of 1940 [15 U.S.C.A. § 80a-1 et seq.];

(iv) an insurance company, with respect to insurance activities of the insurance company and activities incidental to such insurance activities, that is subject to supervision by a State insurance regulator; or

(v) an entity that is subject to regulation by the Commodity Futures Trading Commission, with respect to the commodities activities of such entity and activities incidental to such commodities activities.

* * *

Provisions of the Gramm-Leach-Bliley Act (15 U.S.C.)

§ 6701. Operation of State law

(a) State regulation of the business of insurance

* * *

(b) Mandatory insurance licensing requirements

No person shall engage in the business of insurance in a State as principal or agent unless such person is licensed as required by the appropriate insurance regulator of such State in accordance with the relevant State insurance law, subject to subsections (c), (d), and (e).

* * *

(d) Activities

* * *

(2) Insurance sales

(A) In general

In accordance with the legal standards for preemption set forth in the decision of the Supreme Court of the United States in *Barnett Bank of Marion County N.A.* v. *Nelson*, 517 U.S. 25 (1996), no State may, by statute, regulation, order, interpretation, or other action, prevent or significantly interfere with the ability of a depository institution, or an affiliate thereof, to engage, directly or indirectly, either by itself or in conjunction with an affiliate or any other person, in any insurance sales, solicitation, or

crossmarketing activity.

* * *

(C) Limitations

(i) OCC deference

Section 6714(e) of this title does not apply with respect to any State statute, regulation, order, interpretation, or other action regarding insurance sales, solicitation, or cross marketing activities described in subparagraph (A) that was issued, adopted, or enacted before September 3, 1998, and that is not described in subparagraph (B).

* * *

§ 6714. Expedited and equalized dispute resolution for Federal regulators

* * *

(e) Standard of review

The court shall decide a petition filed under this section based on its review on the merits of all questions presented under State and Federal law, including the nature of the product or activity and the history and purpose of its regulation under State and Federal law, without unequal deference.

FEDERAL REGULATIONS INVOLVED

Provisions of the Office of the Comptroller of the Currency Regulations (12 C.F.R.)

§ 5.34 Operating subsidiaries.

(a) Authority. 12 U.S.C. 24 (Seventh), 24a, 93a, 3101 et seq.

(b) Licensing requirements. A national bank must file a notice or application as prescribed in this section to acquire or establish an operating subsidiary, or to commence a new activity in an existing operating subsidiary.

(c) Scope. This section sets forth authorized activities and application or notice procedures for national banks engaging in activities through an operating subsidiary. The procedures in this section do not apply to financial subsidiaries authorized under § 5.39.

* * *

(d) Definitions. For purposes of this § 5.34:

(1) Authorized product means a product that would be defined as insurance under section 302(c) of the Gramm-Leach-Bliley Act (Public Law 106-102, 113 Stat. 1338, 1407) (GLBA) (15 U.S.C. 6712) that, as of January 1, 1999, the OCC had determined in writing that national banks may provide as principal or national banks were in fact lawfully providing the product as principal, and as of that date no court of relevant jurisdiction had, by final judgment, overturned a determination by the OCC that national banks may provide the product as principal. An

authorized product does not include title insurance, or an annuity contract the income of which is subject to treatment under section 72 of the Internal Revenue Code of 1986 (26 U.S.C. 72).

(2) Well capitalized means the capital level described in 12 CFR 6.4(b)(1) or, in the case of a Federal branch or agency, the capital level described in 12 CFR 4.7(b)(1)(iii).

(3) Well managed means, unless otherwise determined in writing by the OCC:

(i) In the case of a national bank:

(A) The national bank has received a composite rating of 1 or 2 under the Uniform Financial Institutions Rating System in connection with its most recent examination; or

(B) In the case of any national bank that has not been examined, the existence and use of managerial resources that the OCC determines are satisfactory.

* * *

(e) Standards and requirements –

(1) Authorized activities. A national bank may conduct in an operating subsidiary activities that are permissible for a national bank to engage in directly either as part of, or incidental to, the business of banking, as determined by the OCC, or otherwise under other statutory authority, including:

(i) Providing authorized products as principal; and

(ii) Providing title insurance as principal if the national bank or subsidiary thereof was actively and lawfully underwriting title insurance before November 12, 1999, and no affiliate of the national bank (other than a subsidiary) provides insurance as principal. A subsidiary may not provide title insurance as principal if the state had in effect before November 12, 1999, a law which prohibits any person from underwriting title insurance with respect to real property in that state.

(2) Qualifying subsidiaries. An operating subsidiary in which a national bank may invest includes a corporation, limited liability company, or similar entity if the parent bank owns more than 50 percent of the voting (or similar type of controlling) interest of the operating subsidiary; or the parent bank otherwise controls the operating subsidiary and no other party controls more than 50 percent of the voting (or similar type of controlling) interest of the operating subsidiary. However, the following subsidiaries are not operating subsidiaries subject to this section:

(i) A subsidiary in which the bank's investment is made pursuant to specific authorization in a statute or OCC regulation (e.g., a bank service company under 12 U.S.C. 1861 et seq. or a financial subsidiary under section 5136A of the Revised Statutes (12 U.S.C. 24a)); and

(ii) A subsidiary in which the bank has acquired, in good faith, shares through foreclosure on collateral, by way of compromise of a doubtful claim, or to avoid a loss in connection with a debt previously contracted.

(3) Examination and supervision. An operating subsidiary conducts activities authorized under this

section pursuant to the same authorization, terms and conditions that apply to the conduct of such activities by its parent national bank. If, upon examination, the OCC determines that the operating subsidiary is operating in violation of law, regulation, or written condition, or in an unsafe or unsound manner or otherwise threatens the safety or soundness of the bank, the OCC will direct the bank or operating subsidiary to take appropriate remedial action, which may include requiring the bank to divest or liquidate the operating subsidiary, or discontinue specified activities. OCC authority under this paragraph is subject to the limitations and requirements of section 45 of the Federal Deposit Insurance Act (12 U.S.C. 1831v) and section 115 of the Gramm-Leach-Bliley Act (12 U.S.C. 1820a).

(4) Consolidation of figures –

(i) National banks. Pertinent book figures of the parent national bank and its operating subsidiary shall be combined for the purpose of applying statutory or regulatory limitations when combination is needed to effect the intent of the statute or regulation, e.g., for purposes of 12 U.S.C. 56, 60, 84, and 371d.

* * *

(5) Procedures –

(i) Application required.

(A) Except as provided in paragraph (e)(5)(iv) or (e)(5)(vi) of this section, a national bank that intends to acquire or establish an operating subsidiary, or to perform a new activity in an existing operating subsidiary, must first submit an

application to, and receive approval from, the OCC. The application must include a complete description of the bank's investment in the subsidiary, the proposed activities of the subsidiary, the organizational structure and management of the subsidiary, the relations between the bank and the subsidiary, and other information necessary to adequately describe the proposal. To the extent the application relates to the initial affiliation of the bank with a company engaged in insurance activities, the bank should describe the type of insurance activity that the company is engaged in and has present plans to conduct. The bank must also list for each state the lines of business for which the company holds, or will hold, an insurance license, indicating the state where the company holds a resident license or charter, as applicable. The application must state whether the operating subsidiary will conduct any activity at a location other than the main office or a previously approved branch of the bank. The OCC may require the applicant to submit a legal analysis if the proposal is novel, unusually complex, or raises substantial unresolved legal issues. In these cases, the OCC encourages applicants to have a pre-filing meeting with the OCC.

(B) A national bank must file an application and obtain prior approval before acquiring or establishing an operating subsidiary, or performing a new activity in an existing operating subsidiary, if the bank controls the subsidiary but owns 50 percent or less of the voting (or similar type of controlling) interest of the subsidiary. These applications are not subject to the filing exemption in paragraph (e)(5)(vi) of this section and are not eligible for the notice procedures in

paragraph (e)(5)(iv) of this section.

* * *

(iii) OCC review and approval. The OCC reviews a national bank's application to determine whether the proposed activities are legally permissible and to ensure that the proposal is consistent with safe and sound banking practices and OCC policy and does not endanger the safety or soundness of the parent national bank. As part of this process, the OCC may request additional information and analysis from the applicant.

(iv) Notice process for certain activities. A national bank that is "well capitalized" and "well managed" may acquire or establish an operating subsidiary, or perform a new activity in an existing operating subsidiary, by providing the appropriate district office written notice within 10 days after acquiring or establishing the subsidiary, or commencing the activity, if the activity is listed in paragraph (e)(5)(v) of this section. The written notice must include a complete description of the bank's investment in the subsidiary and of the activity conducted and a representation and undertaking that the activity will be conducted in accordance with OCC policies contained in guidance issued by the OCC regarding the activity. To the extent the notice relates to the initial affiliation of the bank with a company engaged in insurance activities, the bank should describe the type of insurance activity that the company is engaged in and has present plans to conduct. The bank must also list for each state the lines of business for which the company holds, or will hold, an insurance license, indicating the state where the company holds a resident license or charter, as applicable. Any bank receiving approval under this paragraph is deemed to

have agreed that the subsidiary will conduct the activity in a manner consistent with published OCC guidance.

(v) Activities eligible for notice. The following activities qualify for the notice procedures, provided the activity is conducted pursuant to the same terms and conditions as would be applicable if the activity were conducted directly by a national bank:

(A) Holding and managing assets acquired by the parent bank, including investment assets and property acquired by the bank through foreclosure or otherwise in good faith to compromise a doubtful claim, or in the ordinary course of collecting a debt previously contracted;

(B) Providing services to or for the bank or its affiliates, including accounting, auditing, appraising, advertising and public relations, and financial advice and consulting;

(C) Making loans or other extensions of credit, and selling money orders, savings bonds, and travelers checks;

(D) Purchasing, selling, servicing, or warehousing loans or other extensions of credit, or interests therein;

(E) Providing courier services between financial institutions;

(F) Providing management consulting, operational advice, and services for other financial institutions;

(G) Providing check guaranty, verification and payment services;

(H) Providing data processing, data warehousing and data transmission products, services, and related activities and facilities, including associated equipment and technology, for the bank or its affiliates;

(I) Acting as investment adviser (including an adviser with investment discretion) or financial adviser or counselor to governmental entities or instrumentalities, businesses, or individuals, including advising registered investment companies and mortgage or real estate investment trusts, furnishing economic forecasts or other economic information, providing investment advice related to futures and options on futures. and providing consumer financial counseling;

(J) Providing tax planning and preparation services;

(K) Providing financial and transactional advice and assistance, including advice and assistance for customers in structuring, arranging, and executing mergers and acquisitions, divestitures, joint ventures, leveraged buyouts, swaps, foreign exchange, derivative transactions, coin and bullion, and capital restructurings;

(L) Underwriting and reinsuring credit related insurance to the extent permitted under section 302 of the GLBA (15 U.S.C. 6712);

(M) Leasing of personal property and acting as an agent or adviser in leases for others;

(N) Providing securities brokerage or acting as a futures commission merchant, and providing related credit and other related services;

(O) Underwriting and dealing, including making a market, in bank permissible securities and purchasing and selling as principal, asset backed obligations;

(P) Acting as an insurance agent or broker, including title insurance to the extent permitted under section 303 of the GLBA (15 U.S.C. 6713);

(Q) Reinsuring mortgage insurance on loans originated, purchased, or serviced by the bank, its subsidiaries, or its affiliates, provided that if the subsidiary enters into a quota share agreement, the subsidiary assumes less than 50 percent of the aggregate insured risk covered by the quota share agreement. A "quota share agreement" is an agreement under which the reinsurer is liable to the primary insurance underwriter for an agreed upon percentage of every claim arising out of the covered book of business ceded by the primary insurance underwriter to the reinsurer;

(R) Acting as a finder pursuant to 12 CFR 7.1002 to the extent permitted by published OCC precedent; [Footnote omitted]

(S) Offering correspondent services to the extent permitted by published OCC precedent;

(T) Acting as agent or broker in the sale of fixed or variable annuities;

(U) Offering debt cancellation or debt suspension

agreements;

(V) Providing real estate settlement, closing, escrow, and related services; and real estate appraisal services for the subsidiary, parent bank, or other financial institutions;

(W) Acting as a transfer or fiscal agent;

(X) Acting as a digital certification authority to the extent permitted by published OCC precedent, subject to the terms and conditions contained in that precedent; and

(Y) Providing or selling public transportation tickets, event and attraction tickets, gift certificates, prepaid phone cards, promotional and advertising material, postage stamps, and Electronic Benefits Transfer (EBT) script, and similar media, to the extent permitted by published OCC precedent, subject to the terms and conditions contained in that precedent.

(vi) No application or notice required. A national bank may acquire or establish an operating subsidiary without filing an application or providing notice to the OCC, if the bank is adequately capitalized or well capitalized and the:

(A) Activities of the new subsidiary are limited to those activities previously reported by the bank in connection with the establishment or acquisition of a prior operating subsidiary;

(B) Activities in which the new subsidiary will engage continue to be legally permissible for the subsidiary; and

(C) Activities of the new subsidiary will be conducted in accordance with any conditions imposed by the OCC in approving the conduct of these activities for any prior operating subsidiary of the bank.

(vii) Fiduciary powers. If an operating subsidiary proposes to exercise investment discretion on behalf of customers or provide investment advice for a fee, the national bank must have prior OCC approval to exercise fiduciary powers pursuant to § 5.26.

(6) Annual Report on Operating Subsidiaries –

(i) Filing requirement. Each national bank shall prepare and file with the OCC an Annual Report on Operating Subsidiaries containing the information set forth in paragraph (e)(6)(ii) of this section for each of its operating subsidiaries that:

(A) Is not functionally regulated within the meaning of section 5(c)(5) of the Bank Holding Company Act of 1956, as amended (12 U.S.C. 1844(c)(5)); and

(B) Does business directly with consumers in the United States. For purposes of paragraph (e)(6) of this section, an operating subsidiary, or any subsidiary thereof, does business directly with consumers if, in the ordinary course of its business, it provides products or services to individuals to be used primarily for personal, family, or household purposes.

(ii) Information required. The Annual Report on Operating Subsidiaries must contain the following information for each covered operating subsidiary listed:

(A) The name and charter number of the parent national bank;

(B) The name (include any "dba" (doing business as), abbreviated names, or trade names used to identify the operating subsidiary when it does business directly with consumers), mailing address (include the street address or post office box, city, state, and zip code), e-mail address (if any), and telephone number of the operating subsidiary;

(C) The principal place of business of the operating subsidiary, if different from the address provided pursuant to paragraph (e)(6)(ii)(B) of this section; and

(D) The lines of business in which the operating subsidiary is doing business directly with consumers by designating the appropriate code contained in appendix B (NAICS Activity Codes for Commonly Reported Activities) to the Instructions for Preparation of Report of Changes in Organizational Structure, Form FR Y-10, a copy of which is set forth on the OCC's Web site at http://www.occ.gov. If the operating subsidiary is engaged in an activity not set forth in this list, a national bank shall report the code 0000 and provide a brief description of the activity.

(iii) Filing time frames and availability of information. Each national bank's Annual Report on Operating Subsidiaries shall contain information current as of December 31st for the year prior to the year the report is filed. The national bank shall submit its first Annual Report on Operating Subsidiaries (for information as of December 31, 2004) to the OCC on or before January 31, 2005, and on or before January 31st each year thereafter. The national bank may

submit the Annual Report on Operating Subsidiaries electronically or in another format prescribed by the OCC. The OCC will make available to the public the information contained in the Annual Report on Operating Subsidiaries on its Web site at http://www.occ.gov.

§ 7.4000 Visitorial powers.

(a) General rule.

(1) Only the OCC or an authorized representative of the OCC may exercise visitorial powers with respect to national banks, except as provided in paragraph (b) of this section. State officials may not exercise visitorial powers with respect to national banks, such as conducting examinations, inspecting or requiring the production of books or records of national banks, or prosecuting enforcement actions, except in limited circumstances authorized by federal law. However, production of a bank's records (other than non-public OCC information under 12 CFR part 4, subpart C) may be required under normal judicial procedures.

(2) For purposes of this section, visitorial powers include:

(i) Examination of a bank;

(ii) Inspection of a bank's books and records;

(iii) Regulation and supervision of activities authorized or permitted pursuant to federal banking law; and

(iv) Enforcing compliance with any applicable federal or state laws concerning those activities.

(3) Unless otherwise provided by Federal law, the OCC has exclusive visitorial authority with respect to the content and conduct of activities authorized for national banks under Federal law.

(b) Exceptions to the general rule. Under 12 U.S.C. 484, the OCC's exclusive visitorial powers are subject to the following exceptions:

(1) Exceptions authorized by Federal law. National banks are subject to such visitorial powers as are provided by Federal law. Examples of laws vesting visitorial power in other governmental entities include laws authorizing state or other Federal officials to:

(i) Inspect the list of shareholders, provided that the official is authorized to assess taxes under state authority (12 U.S.C. 62; this section also authorizes inspection of the shareholder list by shareholders and creditors of a national bank);

(ii) Review, at reasonable times and upon reasonable notice to a bank, the bank's records solely to ensure compliance with applicable state unclaimed property or escheat laws upon reasonable cause to believe that the bank has failed to comply with those laws (12 U.S.C. 484(b));

(iii) Verify payroll records for unemployment compensation purposes (26 U.S.C. 3305(c));

(iv) Ascertain the correctness of Federal tax returns (26 U.S.C. 7602);

(v) Enforce the Fair Labor Standards Act (29 U.S.C. 211); and

(vi) Functionally regulate certain activities, as provided under the Gramm-Leach-Bliley Act, Pub.L. 106-102, 113 Stat. 1338 (Nov. 12, 1999).

(2) Exception for courts of justice. National banks are subject to such visitorial powers as are vested in the courts of justice. This exception pertains to the powers inherent in the judiciary and does not grant state or other governmental authorities any right to inspect, superintend, direct, regulate or compel compliance by a national bank with respect to any law, regarding the content or conduct of activities authorized for national banks under Federal law.

(3) Exception for Congress. National banks are subject to such visitorial powers as shall be, or have been, exercised or directed by Congress or by either House thereof or by any committee of Congress or of either House duly authorized.

(c) Report of examination. The report of examination made by an OCC examiner is designated solely for use in the supervision of the bank. The bank's copy of the report is the property of the OCC and is loaned to the bank and any holding company thereof solely for its confidential use. The bank's directors, in keeping with their responsibilities both to depositors and to shareholders, should thoroughly review the report. The report may be made available to other persons only in accordance with the rules on disclosure in 12 CFR part 4.

§ 7.4006 Applicability of State law to national bank operating subsidiaries.

Unless otherwise provided by Federal law or OCC regulation, State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank.

§ 34.1 Purpose and scope.

(a) Purpose. The purpose of this part is to set forth standards for real estate-related lending and associated activities by national banks.

(b) Scope. This part applies to national banks and their operating subsidiaries as provided in 12 CFR 5.34.

* * *

§ 34.4 Applicability of state law.

(a) Except where made applicable by Federal law, state laws that obstruct, impair, or condition a national bank's ability to fully exercise its Federally authorized real estate lending powers do not apply to national banks. Specifically, a national bank may make real estate loans under 12 U.S.C. 371 and § 34.3, without regard to state law limitations concerning:

(1) Licensing, registration (except for purposes of service of process), filings, or reports by creditors;

(2) The ability of a creditor to require or obtain private mortgage insurance, insurance for other collateral, or other credit enhancements or risk mitigants, in furtherance of safe and sound banking practices;

(3) Loan-to-value ratios;

(4) The terms of credit, including schedule for repayment of principal and interest, amortization of loans, balance, payments due, minimum payments, or term to maturity of the loan, including the circumstances under which a loan may be called due and payable upon the passage of time or a specified

event external to the loan;

(5) The aggregate amount of funds that may be loaned upon the security of real estate;

(6) Escrow accounts, impound accounts, and similar accounts;

(7) Security property, including leaseholds;

(8) Access to, and use of, credit reports;

(9) Disclosure and advertising, including laws requiring specific statements, information, or other content to be included in credit application forms, credit solicitations, billing statements, credit contracts, or other credit-related documents;

(10) Processing, origination, servicing, sale or purchase of, or investment or participation in, mortgages;

(11) Disbursements and repayments;

(12) Rates of interest on loans;[29]

(13) Due-on-sale clauses except to the extent provided in 12 U.S.C. 1701j-3 and 12 CFR part 591; and

(14) Covenants and restrictions that must be

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[29] The limitations on charges that comprise rates of interest on loans by national banks are determined under Federal law. *See* 12 U.S.C. 85 and 1735f-7a; 12 CFR 7.4001. State laws purporting to regulate national bank fees and charges that do not constitute interest are addressed in 12 CFR 7.4002.

contained in a lease to qualify the leasehold as acceptable security for a real estate loan.

(b) State laws on the following subjects are not inconsistent with the real estate lending powers of national banks and apply to national banks to the extent that they only incidentally affect the exercise of national banks' real estate lending powers:

(1) Contracts;

(2) Torts;

(3) Criminal law;[30]

(4) Homestead laws specified in 12 U.S.C. 1462a(f);

(5) Rights to collect debts;

(6) Acquisition and transfer of real property;

(7) Taxation;

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[30] *But see* the distinction drawn by the Supreme Court in *Easton* v. *Iowa*, 188 U.S. 220, 238 (1903) between "crimes defined and punishable at common law or by the general statutes of a state and crimes and offences cognizable under the authority of the United States." The Court stated that "[u]ndoubtedly a state has the legitimate power to define and punish crimes by general laws applicable to all persons within its jurisdiction ** *. But it is without lawful power to make such special laws applicable to banks organized and operating under the laws of the United States." *Id.* at 239 (holding that Federal law governing the operations of national banks preempted a state criminal law prohibiting insolvent banks from accepting deposits).

(8) Zoning; and

(9) Any other law the effect of which the OCC determines to be incidental to the real estate lending operations of national banks or otherwise consistent with the powers and purposes set out in § 34.3(a).